UNLOCK's Proposed Filtering Approach

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1. Purpose

This document sets out UNLOCK's views on the old step-down process, proposes new 'filtering rules' and how they should be applied in the future.

UNLOCK's views are drawn from a consultation recently carried out with our members (who are individuals with previous convictions), to which we received a substantial number of qualitative responses. Many submissions made some very practical recommendations as to how a system of filtering cautions and convictions should work. We have sought to include a number of these within this document where appropriate. Personal details have been removed where necessary to protect privacy.

Although there appears to be a general consensus that the current system isn't adequate, we have linked at the bottom of this document to submissions we previously received from our members in response to Sunita Mason's Independent Review, where the problems with the old system were clearly evidenced.

2. Views on step down

Benefits

1. Many individuals with very old and minor convictions have benefitted from it
2. It is relatively easy to understand (aside from the multiple pages listing offence categories)
3. It does not involve the use of police discretion, therefore keeping costs down
4. It has been relatively uncontentious

Problems

1. The purpose of 'step down' was to, amongst other things, limit the information disclosed on a CRB check so that unnecessary information was not disclosed which prevented people with convictions from getting into employment. However, the long time periods that were attached to each category of offence/disposal essentially defeat this purpose.
2. The process wasn't established in primary legislation, and was therefore easily removed at the discretion of the Police.
3. Due to the Police Act 1997, the Rehabilitation of Offenders Act 1974 (ROA) and Exceptions Order 1975, individuals were still required to disclose convictions that had been 'stepped-down'
4. The 'step-down' periods were not evidence-based. They appear to have been devised by the gut instinct of police officials. The breakdown of sentence disposals are not linked to disclosure legislation (e.g. ROA) or the likelihood of reconviction.
5. 'Stepped-down' convictions could still be disclosed on an enhanced CRB check at the Chief Police Officers discretion. This made it difficult for individuals to decide whether to disclose the stepped-down conviction in advance and led to some losing their jobs.
6. The offence-categories were arbitrary, resulting in spurious cases of injustice contrary to the basic principle

3. UNLOCK's principles for filtering

A new filtering system should be one which:

1. **establishes a clear difference between information held on the PNC and information used for disclosure purposes -** distinguishing between PNC data for 'policing purposes' and data for disclosure to ensure that old/minor/irrelevant information is not disclosed. This could be achieving by providing a full PNC extract to the CRB whose staff then apply the filtering rules to the CRB disclosure certificate, but still provide the full extract to the ISA for Vetting & Barring purposes.
2. **is as simple as possible -** making it cheap to implement and easy to understand.
3. **strikes the right balance -** between the provision of safeguarding information and allowing reformed offenders to optimise their contribution to the economy.
4. **automatically 'filters' old/minor conviction information after fixed periods of time -** using a simpler process of 'filtering' which is principled, doesn't create arbitrary categories, and limits inconsistencies. Gary Linton's paper is very useful in setting out why a process was needed and attempting to explain how the categorisation of offences might be useful. However, there is little evidence on the crucial element of how the categories of offences or time periods were arrived at.
5. **ascertains 'seriousness' by reference to the sentence imposed by the court -** which is the most accurate and reliable way to categorise the seriousness of an offence.
6. **only apply to 'clear periods'** – so that the public have confidence in the system
7. **covers all job positions and all types of disclosure** – so that no employers are able to access information once it is filtered. Though it would still be provided to the Independent Safeguarding Authority, the information would only be visible to the ISA and applicant, not the employer.
8. **removes discretion from the police to disclose filtered information** – to avoid rendering the system meaningless for individuals due to the remaining possibility of disclosure.
9. **makes the necessary changes the Police Act 1997 and the Rehabilitation of Offenders Act 1974** – in order to set out the legislative basis for not disclosing certain information held on the PNC, so that individuals have clarity on what they do / do not need to disclose and so that they can be afforded legislative protection where necessary.
10. **is accompanied by clear information & advice regarding retention and disclosure of information on the Police National Computer -** targeting different groups (agencies and individuals at whom each of the publications is aimed should be involved in its drafting) including:
    - Statutory agencies working in the CJS (eg Police, CPS and the Judiciary)
    - Agencies in the CJS (third sector/voluntary organisations, private organisations)
    - Individuals prior to receiving a disposal (particularly out-of-court, e.g. cautions)
    - Individuals with information currently held on the PNC

4. Categorisation of offences

One area which seems to have split opinion is how to categorise offences over and above that of sentence/disposal.

Categorisation by type of offence – the step down model

1. This model categorises offences into 3 groups, "based on the needs of a variety of users".
2. It is not clear how these categories were arrived at, and what principles underpin such categorisation.
3. The categories appear to attempt to establish levels of 'seriousness' but to fail to do so. They create arbitrary lines of morality which do not reflect the circumstances surrounding specific offences. The categories achieve nothing other than creating anomalies and inconsistencies, raising innumerable questions about specific offences.
4. Judgements on the seriousness of an individual instance of an offence are the responsibility of the judiciary, not the executive.
5. The model creates problems with different charging standards placing individuals in different categories, potentially resulting in consideration before charge/court as to how to prosecute (from the CPS perspective) and how to plead (from an individual's perspective) depending on what category the offence falls into.
6. The model is not as simple as it could be. It is often difficult for individuals to know precisely of which offence they were convicted. They will, however, commonly know what sentence they were given.

Categorisation by maximum sentence – the amalgamated model

1. This model categorises offences into 4 groups, reflecting the "ACRO lists" which essentially categorise based on the maximum sentence that can be given for that offence.
2. It is not clear what the logic is behind using the maximum sentence possible as a way of categorising offences for the purposes of filtering. The maximum sentence only determines the seriousness of the most extreme instance of an action for which an individual can be charged and prosecuted of under a particular section of legislation. It was never the intention of parliament that the maximum sentence would be used to reflect the seriousness of a more minor offence under a section.
3. This model would unfairly disadvantage those charged under sections with a broad range of possible sentences, as it would result in a higher offence categories for very minor offences. Two individuals receiving the same sentence (and therefore committed offences of similar seriousness) could have different filtering rules applied to their offence.
4. For example, theft is a category 'B' offence under this categorisation, and assault occasioning ABH is a category 'C' offence. Both could be given a non-custodial sentence. However, whilst the assault occasioning ABH offence would be filtered after 1 year, the theft offence would not be filtered under after 3.5 years. Some would argue that assault occasioning ABH is a more serious offence. However, without the details of the case at hand, it is impossible to assess this.

5. Another example of possible inconsistency is that it is possible under this model to get a caution for a category A offence which is never filtered, but get 7 years in prison for a category B offence which gets filtered after 14 years.
6. Judgements on the seriousness of an individual instance of an offence are the responsibility of the judiciary, not the executive.
7. It is not clear what would happen if the maximum sentence length for a particular offence was revised and moved a certain offence into a different category. Presumably, given when the filtering rules would be applied to an individual's PNC record, an individual would be subjected to the revised version, therefore leaving open the possibility of changes in sentencing applying retrospectively for the purposes of filtering.
8. The model creates problems with different charging standards placing individuals in different categories, potentially resulting in consideration before charge/court as to how to prosecute (from the CPS perspective) and how to plead (from an individual's perspective) depending on what category the offence falls into.
9. The model is not as simple as it could be. It is often difficult for individuals to know precisely of which offence they were convicted. They will, however, commonly know what sentence they were given.
10. Even if individuals know under what section they were charged, they will need to ascertain the maximum sentence to know what category they fall into.

Categorisation by sentence/disposal only

UNLOCK agrees with the principle of judging the seriousness of offences for the purposes of setting filtering periods. However, the approaches in the above models appear to lack logical justification for the way in which they differentiate between offences. Rather, models evidence how effectively categorising offences *specifically for the purposes of filtering* has yet to be achieved. Furthermore, both models make the system more difficult for individuals to understand.

UNLOCK asserts that the only principled, balanced, sound and justifiable process for filtering is to base the filtering rules purely on sentence/disposal.

The reasons for this are as follows:

1. The disclosure periods under the Rehabilitation of Offenders Act 1974 (ROA) are based on sentence/disposal only. Whilst the *periods* of filtering would not match with those in the ROA (or the recent Bill), it seems logical to create a process which sits within the current framework to achieve consistency. This would further allow the filtering rules to sit with any future amendments to the ROA.
2. The court is the only place and time where a case is looked at in its entirety, assessing the seriousness of the offence given the specific circumstances including any elements of aggravation or mitigation. The court then applies a sentence is relation to the seriousness of the offence.
3. Attempt to categorise offences beyond the sentence given will result in constant debate over specific offences being in certain categories, as it will be possible to put forward extreme cases of most offences. There would be pressure to alter these provisions after high profile cases.

Comments from our members on this include:

- *"Under the stepped down process people with police cautions for personal possession of Class A drugs did not have them stepped down for 10 years. Yet crimes like burglary and common assault are Class B / C crimes and were stepped down after 5 years."*
- *"My only other though would be that processes for "spending" and "stepping down" should be in line with the penalty incurred. This is the only way to take into account the real severity of the crime committed."*
- *"My own offence: '9. 1. 5. 5 Possessing controlled drug – Class A – MDMA' is a Category A one. The police list of Category A crimes is topped by '1. 1. 1. 1. Genocide' and contains such other offences as knowingly causing a nuclear explosion and child rape which, I submitted, are considerably more serious than my own offence, and also drug dealing – which, I reasoned, should be made entirely distinct from possession, since in most cases the two offenders would be at opposite ends of the spectrum. Category B includes such crimes as poisoning, cruelty to children and death by drug-driving; Category C includes battery, and assault of a customs officer – all of these, I suggested, are more serious than my own offence, and yet a caution resulting from any of them would last five years, to my ten."*

5. Time periods

The time periods set out in the old step down model for each sentence/offence are far too long. Recommending a model which has periods including as N/A, 35 years and 30 years does not achieve our understanding of the aim of the Independent Panel. Given the circumstances in which the model was set up, it is perhaps not surprising that it errs on the side of caution, rather than taking a balanced approach.

The time periods which are set out in the amalgamated model appear to be more in line with the aim of establishing filtering rules that removes old/minor convictions.

However, the one issue that we have is that we are concerned that offences that are categorised as 'A' can never be filtered, irrespective of what sentence/outcome is used. If an offence were so serious so as to justify never being filtered, it would not have been dealt with by way of a minor sentence/disposal (such as a caution). A number of comments from our members illustrate this point well:

- *"If a crime is of a serious nature and needs to be brought to an individual employer's attention, then shouldn't it go through a court of law?"*
- *"Put simply, my view is that since Home Office guidelines to police on the administering of these stipulate that they should only be issued for less serious offences (see http://www.homeoffice.gov.uk/about-us/home-office-circulars/circulars-2008/016-2008/), then almost by definition records of these held on the PNC ought not to be disclosed in CRB checks. It seems to me that you can't have it both ways. If an offence is deemed too minor to go before court, then by the same token it ought not to be something that employers can find out about and potentially be prejudiced by – even where 'positions of trust' are involved."*

- *"Back in 1999, when the Home Office held a consultation on these changes, it registered the case for not extending the exceptions order to the 1974 legislation to cautions: 'It could be argued that, were an offence so serious that it warranted someone being effectively excluded from employment in a particular field, it would be unlikely to be appropriate to be dealt with by way of a caution in the first place' (see section 9.2 of the attached HO consultation paper). The Rehabilitation of Offenders Act 1974 and Cautions, Reprimands and Final Warning – A Consultation Paper, August 1999)"*

For the purposes of developing a filtering system, one has to assume that minor sentences/disposals (such as cautions) are administered appropriately. If this is not the case, this should be subject to a separate inquiry.

We recommend that the time periods should be based on an informed approach to the risk of reconviction.

In *Breaking the Circle*, the disclosure periods were calculated by using the risk of reconviction when balancing against public protection. The evidence suggested that the risk of re-convictions was at its highest in the couple of years following conviction in the case of non-custodial sentences, and within a couple of years of *release* in the case of custodial sentences. The Bill before Parliament which seeks to act on the Governments response to *Breaking the Circle* adopts disclosure periods that are in line with this evidence. We would welcome this research, along with others, to be applied to the periods set out for 'filtering' so as to achieve an automatic, objective and consistent approach.

However, a comment which we picked out from those submitted by our members was the following; *"I consider non-disclosure of minor convictions/cautions after a period of 3 or 5 years would be reasonable and proportionate to the offences, and act as encouragement for people to continue to 'get their lives back together', rather than fearing for their future employment/career."*

6. The UNLOCK model of automatic filtering

This is the first opportunity that we have had to put forward a proposed model, and would therefore welcome this being considered in conjunction with the other proposed filtering models put forward. In our paper to Sunita Masons' review in February 2010, we recommended:

- ***"In the short-term, reinstate the 'step down' process.***
  ....Although this procedure was by no means perfect, it did at least have the potential to allow for non-disclosure of certain convictions as part of a CRB check. Removal of the 'step down' procedure has left many people whose convictions had already been stepped down in a position where those convictions are now automatically disclosed."

This was only ever intended to be a short-term recommendation to plug the gap between then and now. We feel that now presents the panel with an opportunity address some of the problems with the old step down process whilst still delivering on a system which both achieves its purpose and retains the benefits that it previously brought.

The table below sets out our views on how an automatic filtering process (in yellow) would operate in addition to other arrangements.

Sentence	Proposed periods of disclosure in the ROA (Amendment) Bill	UNLOCK's proposed periods of ROA disclosure	Filtering period/rules for standard or enhanced CRB disclosure	Independent Safeguarding Authority
Life Sentence and IPP's	Forever	On application	On application	In perpetuity
Custody - more than 4 years	Sentence + 4 years	4 years from release	14 years from release	In perpetuity
Custody - more than 6 months, up to 4 years	Sentence + 2 years	2 years from release	10 years from release	In perpetuity
Custody 6 months or under	Sentence + 2 years	2 years from release	7 years from release	In perpetuity
Probation	Sentence + 1 year	1 year from end of Probation	3 years from end of Probation	In perpetuity
Fine	1 year	1 year	3 years from sentence	In perpetuity
Caution	Nil – not disclosed	Nil – not disclosed	2 years from disposal	In perpetuity
Reprimand or final warning	Nil – not disclosed	Nil – not disclosed	2 years from disposal	In perpetuity
PND, Acquittal, CJ Arrestee, Decriminalised, Other	Nil – not disclosed	Nil – not disclosed	Nil – not disclosed	In perpetuity

For young people, these periods would be halved.

We accept that "from release/end of Probation" may be difficult to implement given the system. In reality, it may be that for the time being time "from sentence" is the only viable option logistically. However, the reason for this suggestion is that the risk of reconviction is based on time spent after release, rather than time since sentence.

It is important to note this table forms part of our wider proposal which would allow for convictions to become filtered in advance of the automatic date on application. This allows the automatic time periods to be longer than they would otherwise be if they were the only way in which convictions could become filtered. We feel this strikes an appropriate balance between giving an opportunity to reformed offenders to start afresh and the provision of safeguarding information.

Who would be responsible?

We feel that this process of filtering could be best operated by the CRB after having being provided with a full PNC extract. This would enable the CRB to undertake their current function of being the

administrative arm of the ISA, as the ISA would, under our proposal, still have access to all PNC information in perpetuity.

There would, however, need to be safeguards in place to ensure that the risk of disclosing filtered information was limited as far as could reasonably be expected, so as to avoid possible abuse of the process and ensure that individuals are not placed in a difficult situation with those in receipt of the disclosed information.

An automatic process

We would envisage this being an automatic process (therefore not one that is discretionary), which required 'clear periods' before filtering rules applied, so that the public have confidence in the system. We also feel that, to retain the integrity of the process, it should not be subject to the Chief Police Officer's discretion to disclose even once filtered, as this would undermine the whole process. Comments from our members on this issue illustrate this point strongly:

- *"What exactly does it mean by at the discretion of the Chief Constable? – If he/she is having a bad day does that mean they will chose to reveal the information that I didn't want anybody to know about?"*
- *"Also the previous system where the police said they would disclose stepped down information "if relevant" is not very helpful at all. Upon receiving the step down of my cautions I wrote back to the police requesting in writing that they would not show on a CRB as a relevance test has been applied and due to the age of the information they will no longer be disclosed. The police wrote back saying that in effect they can at anytime disclose this information if they suddenly deem it relevant. Step down should in effect wipe the slate clean from a disclosure point of view allowing the individual the chance to contribute to society without the need to worry about the police disclosing irrelevant information, or by, in effect being forced to disclose the information as the stepped down process is not recognised by the employer and ALL information should be disclosed."*
- *"There needs to be an automatic process of removing old conviction data. The police should not be given the responsibility for this filtering process but should retain the information on the PNC for, 'police eyes only'."*
- *"I would like to see a system where the police inform an individual of exactly what is going to be stepped down and when to allow the individual to make important life decisions."*

Raising awareness

Before introducing any filtering process, we feel it is important to ensure that there is a strategy for ensuring that awareness is raised of what the new process is, particularly with those who are most likely to be affected by any changes. This is evidenced in to member submissions; "*The main problem I experienced was discovering the step-down process actually existed in the first place*" and "*the system should be well documented on Government websites and the like, so that those in need of the facts have easy access to them, and so that agencies can avoid distributing misinformation. Standard leaflets should be readily available at all police stations, CABs, etc.*"

A Balanced Approach recommended reviewing the filtering rules once operational for a period. We feel that recommendations to Government should ensure that this recommendation is included so as to assess how effective the system is operating in practice.

7. In addition to the automatic filtering rules

The above model is how we envisage a process of automatic filtering operating. However, while it falls outside of the remit of the Independent Panel, we feel it is important to give context to our suggested process.

We feel that, in addition to the automatic filtering rules set out above, there are two elements which should be taken forward so as to give individuals with convictions that are not yet filtered to opportunity to proactively demonstrate that their convictions are not relevant for particular purposes and for this to then be reflected in the conviction information that is subsequently disclosed.

- **Install a process which allows for individuals to apply in advance of the fixed date (or for where a fixed date doesn't exist) for their conviction to be filtered in exceptional cases -** Fixed time periods are an arbitrary measure, and do not account for the steps that certain individuals have taken since their conviction to reform themselves. A process should therefore exist whereby individuals with criminal conviction data which is not yet filtered (or which can never become automatically filtered) can make an application (for example, to a Government department/agency such as ACRO in the first instance, and then on appeal to the Judiciary) to give an individual the opportunity to prove that the disclosure of a conviction is no longer necessary or proportionate. This could be managed by setting a restriction of being at least half-way through the automatic time-period. A fee could be attached to this process to cover the costs of administration. This system could operate similar to that of applying for a Security Industry licence, where decisions are initially made by the Security Industry Authority (SIA), with the judiciary currently providing a route of appeal.

  Comments received from our members on this issue include:
  - *"The other alternative is a tribunal - an opportunity to explain why it should be removed and then a decision is made as to whether it needs to be removed or remain. Based on the individuals circumstances."*
  - *"I think representations should be able to be made to any relevant body overseeing the step down in order to allow, if possible, the time limit to be shortened as everyone will become rehabilitated in different periods of time and is dependent on the individual's life circumstances and experiences."*
  - *"I would also be in favour of a system where you could pro-actively do something to 'rehabilitate' yourself earlier or as an additional criterion to the elapse of time since your offence. For example if you could undertake some sort of rehabilitation programme or do relevant voluntary work of some sort. I understand for traffic offences this approach is adopted."*
  - *"It's frustrating that under the present system I can do absolutely nothing to demonstrate that I am reformed or have moved on, so as to rehabilitate myself in the eyes of employers."*

- **Information that is not filtered should be further subject to a stricter definition of 'relevancy' under the Police Act 1997** - A process which assesses 'relevancy' not only on whether it does or doesn't fall within the filtering rules, but also whether it is actually 'relevant' for the purposes of a CRB check, particularly given that CRB-eligible positions are exempt from the Rehabilitation of Offenders Act 1974 (ROA) because of specific risks in those roles. An assessment should be made of a particular position which is exempt from the

ROA, and then look to disclose on a CRB all unspent convictions, as well as those which, although are now spent, are of particular relevance to that job-role. For example, for a FSA-approved position, disclose all unspent convictions as well as spent convictions which were financially-related, but not any spent convictions which are unrelated to the job. Such a system could be achieved by amending the definition of 'any relevant matter' under the Police Act 1997 which obliges the CRB to disclose 'relevant' information for the purposes of a disclosure check.

Comments received from our members on this issue include:

- *"I would also like to see greater discrimination in terms of what can be disclosed within the step down period. For example in my profession the enhanced disclosure is required to capture offences directly relevant to the profession – such as fraud, deception and misuse of money. I have to disclose my offence – possession of a banned substance – which is not directly relevant to the employment. However I suspect that I will still be discriminated against despite this."*
- *"In disclosure, offence data ought to be only disclosed if it presents a relevant risk to the employer etc."*

8. Conclusion

We remain firm in the belief that reinstatement of the 'step down' procedure is an absolute minimum requirement, given the number of practical experiences which unfortunately we have already been made aware of.

- *"Step-down was not perfect and it had many flaws but it was better than nothing."*
- *"Removal of the step down process is immediately career restricting as I do not feel able to pursue opportunities and potentially career ending if disclosure occurs."*
- *"The Step-Down model changed my life, temporarily."*
- *"Now the police have removed this system I am in a position where I have made life changing career decisions, completed a masters degree and four years of training based on the fact that I would have a clean CRB; but unfortunately I do not, which is a huge hindrance and causes me much distress."*
- ***"**If the step-down model was re-instated and a mechanism put in place so that not only stepped-down convictions won't show in a standard CRB disclosure, but it was also unnecessary to declare these old and minor convictions if the post is exempt from the ROA, my life would change enormously for the better. I could continue a productive career as a clinical scientist giving back to society and not live in fear."*

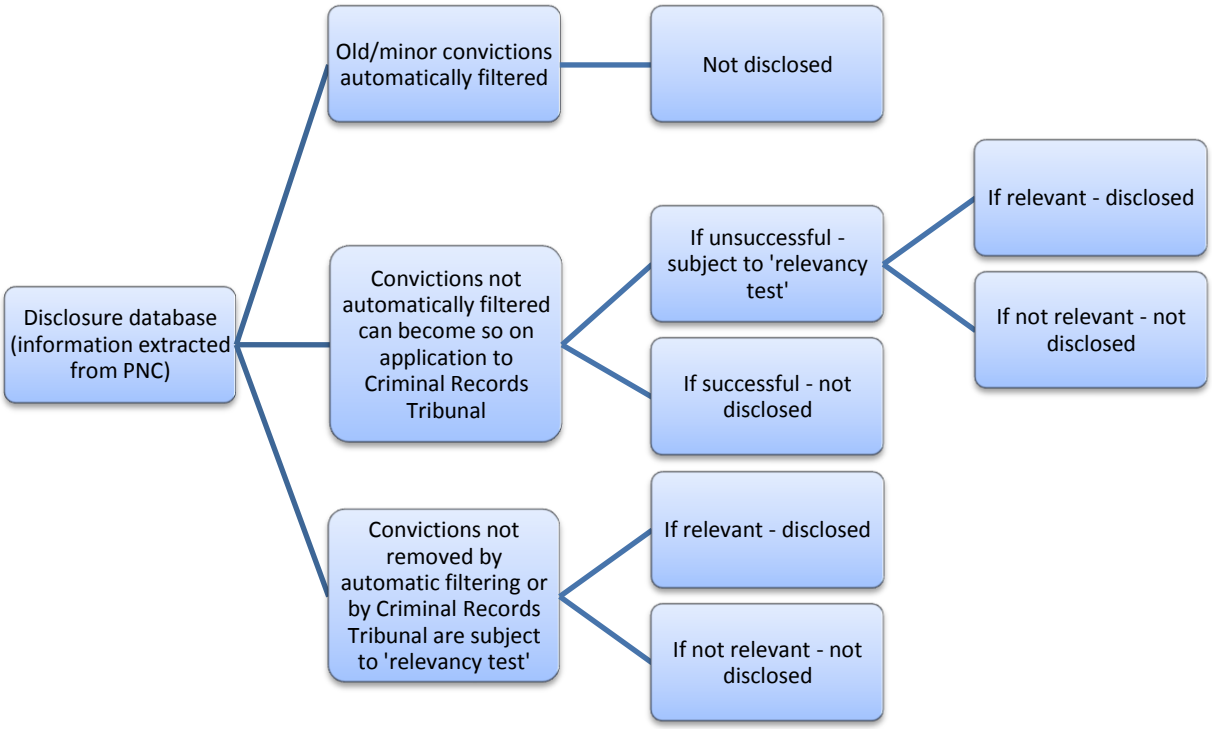
However, we feel that we have an opportunity in presenting recommendations to Government that would significantly improve the old process so that, when coupled with future reform to the ROA and changes to the way that CRB's are carried out, we will achieve a more balanced approach between risk management and potential for harm on the one side, and reducing the discrimination that people with convictions face in seeking employment on the other.

Our proposal for automatic filtering is relatively simple and straightforward to implement, whilst being robust enough to justify. It should be relatively cheap (or at least cheaper than other suggestions), as we feel it is less burdensome administratively than others that have been outlined.

9. Appendix - Recommended system of disclosure

This diagram shows UNLOCK's recommended system to determine whether a criminal conviction is disclosed for the purpose of a standard or enhanced CRB check.

The top element is the specific element which pertains to establishing specific filtering rules. However, this diagram helps to set out how we see the ability of fixed and simple 'filtering' rules to result in convictions being 'filtered'.



10. Links to related documents

UNLOCK Submission to the Independent Review of Retention & Disclosure, *February 2010*	http://www.unlock.org.uk/userfiles/file/employment/UNLOCK%20Submission%20to%20Independent%20Review%20of%20Policy%20on%20Retention%20%20Disclosure%20of%20Records%20on%20the%20PNC%20Feb10.pdf
UNLOCK Member Submissions to the Independent Review, *February 2010*	http://www.unlock.org.uk/userfiles/file/employment/UNLOCK%20Member%20Submissions2.pdf