5  The Disclosure & Barring Service and Disclosure of Criminal Records

Introduction

5.01
The contexts in which individuals are most commonly called upon to disclose their criminal record are in the fields of employment/volunteering and immigration. The rules governing when an individual’s criminal record will be disclosed to a potential employer or immigration authority are complex and this chapter is intended to give an overview of the existing legal framework governing disclosure.

5.02

5.03
Following the Supreme Court decision in R (on the application of T) v Secretary of State for the Home Department the secondary legislation referred to above was enacted to create a comprehensive scheme for the disclosure of criminal records, commonly known as the ‘filtering’ scheme. That scheme has been considered by the Supreme Court in the case of P, G & W v Secretary of State for the Home Department and certain elements of it have been declared to be incompatible with the European Convention on Human Rights (ECHR), Article 8. This means that, at the time of writing, the scheme continues to

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1 SI 2013/1200.
2 SI 2013/1198.
3 [2014] UKSC 35.
operate as mandated in the legislation, but the government may at some point introduce new legislation to make the scheme compatible with Article 8.

5.04 Disclosure of criminal records in the immigration context is done via the ACRO Police Certificate scheme, which is subject to the ‘step down’ model (see para 5.52).

**Self-disclosure and the Rehabilitation of Offenders Act 1974**

5.05 Under the ROA 1974 individuals are not required to disclose convictions and cautions once they have become ‘spent’. A conviction or caution will become spent after a certain period of time, known as the ‘rehabilitation period’, has elapsed.\(^5\) The amount of time that has to pass before a conviction becomes spent depends upon the sentence that was received for the offence and the age of the individual when they were convicted. Examples of the most common rehabilitation periods are as follows:\(^6\):

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Rehabilitation period</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Over 18 at date of conviction</td>
</tr>
<tr>
<td>Imprisonment for over four years</td>
<td>Never spent</td>
</tr>
<tr>
<td>Community Order and Youth Rehabilitation Order</td>
<td>Full length of the Order plus one year</td>
</tr>
<tr>
<td>Fine</td>
<td>One year</td>
</tr>
<tr>
<td>Conditional discharge</td>
<td>Full length of the discharge period</td>
</tr>
<tr>
<td>Simple caution or youth caution</td>
<td>Spent immediately</td>
</tr>
</tbody>
</table>

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5 In practical terms, this means that if they are asked whether or not they have any convictions or cautions (for instance on an application form for a job or insurance) they are entitled by law to answer ‘no’ to that question if the conviction or caution is spent.

6 For a more comprehensive list see Appendix F.
5.06

The protection from the requirement to disclose is subject to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975\(^7\) (the 1975 Order). The 1975 Order removes the protection of non-disclosure in certain specified circumstances. In particular, Article 3 of the 1975 Order removes the protection in relation to questions asked in order to assess suitability for employment in the various positions listed in Schedule 1 to the 1975 Order. Article 4 removes the protection in relation to applications for jobs, *inter alia*, working with children and vulnerable adults. Questions asked of candidates for employment in these fields are, therefore, not subject to the protection of the ROA 1974. This means that an individual who applies for positions in these areas must, if asked,\(^8\) self-disclose convictions and cautions even if they are spent. The individual will not have to disclose certain convictions and cautions if they are classified as ‘protected’,\(^9\) and are therefore subject to the ‘filtering’ scheme (see para 5.15).

**The Disclosure & Barring Service**

5.07

The Disclosure & Barring Service (DBS) came into being on 1 December 2012 following the merger of the functions of the Criminal Records Bureau and the Independent Safeguarding Authority. Under the Police Act 1997, Part V,\(^10\) the DBS is required to issue a Criminal Record Certificate (CRC) or an Enhanced Criminal Record Certificate (ECRC) to any person who applies for such a certificate on an application countersigned by a ‘registered person’.

5.08

Registered persons are those entered on a register maintained by the Secretary of State containing the names of those who demonstrate a potential requirement of a need to ask ‘exempted questions’, ie to obtain copies of an individual’s criminal record (including certain spent convictions). An exempted question is a question that is relevant to suitability for engagement in specified sensitive activities and is defined by the Police Act 1997, s 113A(6) as:

‘… a question which … so far as it relates to convictions, is a question to which section 4(2)(a) or (b) of the [ROA 1974] (effect of rehabilitation) have been excluded by an order of the Secretary of State under section 4(4) of that Act …’.

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\(^7\) SI 1023/1975 (made pursuant to the ROA 1974, s 4(4)) (as amended by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013, SI 2013/1198: see Appendices 12 and 13 respectively.

\(^8\) The obligation to self-disclose only arises if a person is asked; there is no obligation to unilaterally declare.


\(^10\) See Appendix A.
5.09 The Disclosure & Barring Service and Disclosure of Criminal Records

5.09
Registered persons are subject to the Home Office Revised Code of Practice for DBS Registered Persons, issued in November 2015.\(^{11}\)

**Criminal record checks: Basic, Standard and Enhanced Certificates**

5.10
There are three types of DBS criminal record certificate available in England and Wales: a Criminal Conviction Certificate (CCC); a CRC; and an ECRC.

5.11
The DBS CCC is issued under the Police Act 1997, s 112 upon request to individuals and responsible organisations and will disclose all unspent convictions and conditional cautions only.

5.12
A ‘standard’ DBS check results in the DBS issuing a CRC under the Police Act 1997, s 113. These certificates are issued to individuals upon request from registered persons dealing with applications for positions that are exempted under the ROA 1974.\(^ {12}\) A standard check will disclose all unspent convictions, cautions, warnings and reprimands and all spent convictions, cautions, warnings and reprimands that are held on the Police National Computer (PNC) and that are not subject to filtering.

5.13
An ‘enhanced’ DBS check involves the DBS issuing an ECRC under the Police Act 1997, s 115. These certificates are issued to individuals upon request from registered persons dealing with applications for positions referred to in the Police Act 1997, s 115, or listed in regulations made under the Police Act 1997.\(^ {13}\)

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\(^{12}\) The types of positions eligible for a standard DBS check are licensed doormen (a CRC being required to make a Security Industry Authority licence application), solicitors and barristers, accountants, veterinary surgeons, Financial Conduct Authority ‘approved persons’ roles, football stewards and traffic wardens. For a full list see the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, Sch 1, as amended, set out in Appendix D.

\(^{13}\) The regulations are the Police Act 1997 (Criminal Records) Regulations 2002, SI 2002/233, the Police Act 1997 (Criminal Records) (Amendment) Regulations 2006, SI 2006/748, and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013, SI 2013/1200. The types of positions eligible for an enhanced DBS check are positions that involve working with children and vulnerable adults, teachers, social workers, NHS professionals, carers and taxi drivers.
An enhanced check will disclose all unspent convictions, cautions, warnings and reprimands, along with all spent convictions, cautions, warnings and reprimands that are held on the PNC that are not subject to filtering. It will also disclose information held on DBS barred lists\(^{14}\) if requested by a registered person. It may also disclose any non-conviction information in the police’s possession that they deem to be relevant to the position applied for, including in certain cases information relating to third parties.

5.14

Before issuing an ECRC the DBS must ask any relevant chief officer to provide any information which the chief officer ‘reasonably believes’ to be relevant for the purposes of an exempted question asked for a prescribed purpose and that ‘ought’ to be included in the certificate.\(^{15}\) Information about arrests that resulted in No Further Action being taken, charges that resulted in not guilty verdicts and ‘soft-intelligence’ type information can therefore be disclosed on an enhanced check if it is deemed to be relevant by the police to the position applied for. Relevant information may also include information about third parties, for example if the applicant is living with a registered sex offender.

Filtering

5.15

The convictions and cautions eligible for disclosure by the DBS on standard and enhanced certificates are governed by the Police Act 1997, Part V. Following the Supreme Court judgment in \(R\) (on the application of \(T\)) \(v\) Secretary of State for the Home Department,\(^{16}\) some convictions will be subject to filtering and therefore not disclosed on either CRCs or ECRCs. The filtering scheme has been in effect since 29 May 2013, pursuant to the Rehabilitation of Offenders Act (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013\(^{17}\) and the Police Act 1997 (Criminal Records Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013.\(^{18}\) The scheme requires disclosure only of the following convictions and cautions:

\[
\begin{itemize}
  \item any ‘current’ conviction or caution. Currency depends upon the period which has elapsed since the date of the conviction or caution and the age of the individual when convicted or cautioned. The following criteria will be applied:
\end{itemize}
\]

\(^{14}\) See para 5.32 ff.

\(^{15}\) Police Act 1997, s 113B(4).

\(^{16}\) [2014] UKSC 35.

\(^{17}\) SI 2013/1198.

\(^{18}\) SI 2013/1200.
a conviction is a ‘current’ conviction if:

– the person was aged 18 or over on the date of the conviction and that date fell within the 11-year period ending with the day on which the certificate is issued, or

– the person was aged under 18 on the date of conviction and that date fell within the period of five years and six months ending with the day on which the certificate is issued;

a caution is a ‘current’ caution if:

– the person was aged 18 or over on the date it was given and that date fell within the six-year period ending with the day on which the certificate is issued, or

– the person was aged under 18 on the date it was given and that date fell within the two-year period ending with the day on which the certificate is issued;

• any spent conviction or caution in respect of certain specified offences (including a number of identified offences of all offences specified in the Criminal Justice Act 2003, Sch 15) (this rule is known as the ‘serious offence’ rule);

• any spent conviction in respect of which a custodial sentence of service detention was imposed;

• any spent conviction where the person has more than one conviction (this rule is known as the ‘multiple offences’ rule).

In summary, therefore, the filtering scheme currently operates as follows in relation to disclosure of criminal convictions and cautions in the employment/volunteering context:

19 NB: the disclosure of caution-type disposals received when an individual was under 18, ie reprimands, warnings and now youth cautions has been declared incompatible with the ECHR, Article 8 by the Supreme Court in the P, G & W case. This rule may, therefore, be subject to change.

20 See the definition of ‘relevant matter’ in the Police Act 1997, s 113A(6)(a)(ii) and (c) and the list of specified offences in the Police Act 1997, s 113A(6D) and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, Articles 2A(1), (2) and (3)(a) read together with article 2A(5). See Appendix G for a full list of offences that will never be filtered.

21 See the definition of ‘relevant matter’ in the Police Act 1997, s 113A(6)(a)(ii), of ‘conviction’ in s 113A(6E) (a), ‘caution’ in s 113A(6E)(b) and ‘custodial sentence and sentence of service detention’ in s 113A(6E)(c) and in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, Articles 2A(2), 2A(3)(b) and 2A(4).

22 See the definition of ‘relevant matter’ in the Police Act 1997, s 113A(6)(b) and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, Articles 2A(2) and 2A(3)(c). The multiple conviction rule has been declared incompatible with the ECHR, Article 8 by the Supreme Court in the P, G & W case, therefore this rule may be subject to change.
Challenging the accuracy of information disclosed in standard and enhanced CRC certificates

Section 117 of the Police Act 1997 (as amended by the Protection of Freedoms Act 2012, s 82) makes provision for the correction of errors on DBS certificates. Common errors include the type of offence being incorrectly recorded, or the disposal at court being incorrectly recorded. Practitioners should always be alive to the possibility of correcting such errors, because it could make the difference between a conviction or caution being disclosed or not. Section 117 states that:

‘117 Disputes about accuracy of certificates

(1) Where an applicant for a certificate under any of sections 112 to 116 believes that the information contained in the certificate is inaccurate he may make an application … to DBS for a new certificate.

(1A) Where any person other than the applicant believes that the information contained in a certificate under any of sections 112 to 116 is inaccurate, that person may make an application in writing to DBS for a decision as to whether or not the information is inaccurate.
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(1B) Where a person believes that the wrong up-date information has been given under section 116A in relation to the person’s certificate, the person may make an application in writing to DBS for corrected up-date information.

(2) DBS shall consider any application under this section; and where it is of the opinion that the information in the certificate is inaccurate, or that the wrong up-date information has been given, it shall issue a new certificate or (as the case may be) corrected up-date information’.

5.18

Any dispute as to the accuracy of the information disclosed in a DBS certificate must therefore be made in writing to the DBS. The DBS has published Form AF15 (a) for this purpose.\textsuperscript{23}

\textbf{Challenging the disclosure of information about convictions and cautions in standard and enhanced certificates}

5.19

An individual who has convictions or cautions disclosed on a CRC or ECRC in accordance with the existing criteria of the filtering scheme currently has no way of challenging the disclosure. There may be particular grounds for bringing judicial review proceedings, depending on the nature of the complaint and the specific circumstances, but grounds will not arise merely by disclosure of unfiltered convictions.\textsuperscript{24}

5.20

The Supreme Court has considered the filtering scheme in the case of \textit{P, G \\& W} and found it to be lawful in most respects, save for the multiple conviction rule and the rules that allow for the disclosure of reprimands, warnings and youth cautions. These rules have been declared incompatible with ECHR, Article 8 but they will continue to operate as they do in the current legislation until and unless new legislation is passed to amend or abolish them (at the time of writing no such amending legislation has been put forward). Practitioners advising clients in this area should therefore take care to ensure that their knowledge of the law is up to date.

\textsuperscript{23} See Appendix N.
\textsuperscript{24} See Chapter 9.
CASE SPOTLIGHT

In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (on the application of P, G & W) v Secretary of State for the Home Department; R (on the application of P) v Secretary of State for the Home Department [2019] UKSC 3

This case related to the filtering mechanism introduced to remove certain convictions from being disclosed. The revised scheme (which had been introduced to respond to the declaration of incompatibility issued in R (on the application of T) v Secretary of State for the Home Department (see para 4.39)) established a filtering mechanism but that all convictions on an individual’s record would always be disclosed if they have more than one conviction (the ‘multiple convictions’ rule) or if a conviction falls into certain pre-defined categories of ‘serious offences’ (the ‘serious offence’ rule). The claimants challenged the legality of those two rules.

The case had succeeded in the Court of Appeal ([2017] EWCA Civ 321), where the court decided that the claimants’ Article 8 rights had been violated by the operation of the revised statutory scheme.

The Supreme Court upheld the declarations of incompatibility which the Court of Appeal made in respect of the multiple conviction rule and in relation to disclosures of reprimands given to young offenders. In particular:

◆ the court reiterated that Article 8 confers a qualified right of privacy, subject to important exceptions for measures which are: (i) ‘in accordance with the law’ (ie the exception of legality); and (ii) ‘necessary in a democratic society in the interests of … public safety … for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights … of others’ (ie the exception of necessity/proportionality) (see para 12 of the judgment);

◆ in relation to the issue of legality, that requires the scheme to be foreseeable and accessible. The rules governing the disclosure of criminal records under both schemes were highly prescriptive, including clearly defined categories in relation to which disclosure was mandatory (ie there was no over-broad discretion or risk of arbitrariness). The impact of the rules was wholly foreseeable. They therefore satisfied the principle of legality;

◆ in relation to the issue of proportionality, the Court considered that the boundaries of the categories in the legislation had been drawn in an acceptable place and it was not possible for the court to say that they were disproportionate (see para 61 of the judgment), with two exceptions. The first exception concerned the multiple
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conviction rule, which provides that where a person had more than one conviction of whatever nature, every conviction had to be disclosed in a CRC. The rule applied irrespective of the nature of the offences, their similarity, the number of occasions involved, or the intervals of time separating them. A rule whose impact on individuals was as capricious as that could not be regarded as a necessary or proportionate way of disclosing to potential employers criminal records indicating a propensity to offend (see para 63 of the judgment). The second exception concerned warnings and reprimands administered to young offenders. Such warnings and reprimands had a wholly instructive purpose, and their use as an alternative to prosecution was designed to avoid any deleterious effect on the young offender's subsequent life. Disclosure to a potential employer would be directly inconsistent with that purpose. The inclusion of warnings and reprimands administered to young offenders among offences which must be disclosed is a category error, and as such an error of principle (see para 64 of the judgment). The result was that, for all appellants except for W, the content of their ECRCs breached their Article 8 rights.

Challenging the disclosure of ‘non-conviction’ information on enhanced certificates

5.22

Although the disclosure of conviction and caution information on CRCs and ECRCs cannot currently be challenged if the disclosed convictions or cautions do not fall to be filtered through the operation of the filtering scheme, the disclosure of non-conviction/intelligence-type information disclosed on ECRCs can be challenged.

5.23

The Home Office’s Statutory Disclosure Guidance was published in August 2015 to assist the police when making decisions on the disclosure of non-conviction/locally held information. It enunciates eight principles that must be followed when making these decisions:

(1) there should be no presumption either in favour of or against providing a specific item or category of information;

(2) information must only be provided if the chief officer reasonably believes it to be relevant for the prescribed purpose;

See Appendix H.