

Bargaining Support Group



**The disclosure and
barring scheme:**

**checking on a worker's
criminal record**

The disclosure and barring scheme: checking on a worker’s criminal record

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The employer's right to check and their responsibilities

Provided the employer has a lawful basis for asking, they do have a right to check the criminal record of someone applying for a role in their organisation if they have that individual's permission.

However, it should be noted that there is no legal requirement for anyone to have a Disclosure and Barring Service (DBS) check, although many employers require their workers to undergo DBS checks as part of their recruitment procedure.

Employers are only legally obliged to ensure that any employee working in '**regulated activity**' (see more below in the section 'What is regulated activity?') with children or vulnerable adults has not been barred from doing so.

Criminal record checks are called **Disclosure and Barring Service (DBS) checks in England and Wales**. The DBS can provide disclosures of any convictions and other relevant information about an individual as required according to the type of check requested.

If appropriate for the level of check, they will also decide whether the person is suitable or not for 'regulated activity' with children or adults.

Scotland (www.mygov.scot/disclosure-types) and **Northern Ireland** (www.nidirect.gov.uk/campaigns/accessni-criminal-record-checks) have slightly different rules for disclosure and criminal records checks.

In Northern Ireland, AccessNI will provide either basic, standard or enhanced criminal record checks dependent on the nature of the role.

In Scotland, Disclosure Scotland undertakes these checks, and will allow eligible individuals to join the **Protecting Vulnerable Groups** scheme.

For most roles, an employer is only entitled to ask about unspent convictions and to carry out a **basic DBS check** (see more below in the section 'Basic checks'), but even then, there is no legal obligation to ask and the employer should only ask if it is necessary.

Workers have a statutory right to conceal a **spent conviction** under the Rehabilitation of Offenders Act 1974. It is illegal for an employer to discriminate against somebody with a spent conviction. Where the conviction is unspent, it is generally up to the discretion of the employer whether or not they employ the person.

"A spent conviction is a conviction which, under the terms of the Rehabilitation of Offenders Act 1974, can be effectively ignored after a specified amount of time.

The amount of time for rehabilitation depends on the sentence imposed, not on the offence. The more serious the conviction, the longer the period of rehabilitation.

For example, if you have received a prison sentence of more than four years, the conviction will never become spent, but cautions become spent immediately (apart from conditional cautions which will become spent after three months).

The Act aims to rehabilitate offenders by not making their past mistakes affect the rest of their lives if they have been on the right side of the law for some time.”

Source: Ask the Police www.askthe.police.uk/Content/Q89.htm

UK government guidance on the Rehabilitation of Offenders Act 1974, explaining the difference between spent and unspent convictions, and outlining which convictions must be declared when applying for jobs and any exceptions.

www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974

UK government information on rehabilitation periods

www.gov.uk/guidance/rehabilitation-periods

The Calculator, managed by the charity Unlock, establishes when criminal convictions become ‘spent’ under the Rehabilitation of Offenders Act 1974, as it applies in England & Wales.

<http://disclosurecalculator.org.uk/>

In some circumstances, where roles are exempt from the Rehabilitation of Offenders Act 1974 such as in healthcare or childcare, an employer has a right to do a more detailed check on a worker’s criminal record when they hire or engage them. The aim is to protect children and those adults who are supported during certain activity, from risk. The employer will be entitled to carry out **a standard or enhanced/enhanced with barred list DBS check**, (see more below in the section ‘Standard and enhanced checks’) depending on the nature of the role.

Many employers will require their workers to undergo these DBS checks as part of their recruitment procedure and safeguarding policy. But employers must remember that if they ask the worker for a standard or enhanced DBS check, they are legally responsible for making sure the role is eligible.

UK government eligibility guidance for standard DBS checks

www.gov.uk/government/publications/dbs-check-eligible-positions-guidance

UK government eligibility guidance enhanced DBS checks

www.gov.uk/government/publications/dbs-workforce-guidance

In Northern Ireland, details on when standard and enhanced checks are required:

www.nidirect.gov.uk/articles/employer-obligations-and-fair-treatment

In Scotland, more details on standard disclosures

www.mygov.scot/standard-disclosure

and enhanced disclosures

www.mygov.scot/enhanced-disclosure

There is no single comprehensive list of **positions exempt from the Rehabilitation of Offenders Act 1974**, (i.e. where it does not apply). Additions and amendments come into force through secondary legislation. However, exempt roles do include nurses, social workers, primary and secondary school teachers.

For England and Wales there is an [online tool](#) which helps to find out what type of check is appropriate for the job www.gov.uk/find-out-dbs-check

Further information in Scotland on the different types of checks:
www.mygov.scot/disclosure-types

Further information in Northern Ireland on the different types of checks:
www.nidirect.gov.uk/articles/employer-obligations-and-fair-treatment

Schools and local authorities also need to take account of the [Childcare \(Disqualification\) and Childcare \(Early Years Provision Free of Charge\) \(Extended Entitlement\) \(Amendment\) Regulations 2018](#) and the [Childcare Act 2006](#). Schools are prohibited from employing a **disqualified person under the Childcare Act**. Reasons for disqualification include inclusion on the DBS Children's Barred List. It also includes living in the same household where another person who is disqualified lives or is employed (disqualification 'by association') where childcare is provided in domestic settings.

It should be noted that disqualification by association is only relevant where childcare is provided in domestic settings (for example where childminding is provided in the home) or under registration on domestic premises. Under the 2018 regulations, schools are no longer required to establish whether a member of staff providing, or employed to work in childcare, is disqualified by association.

Schools are not entitled to ask their staff questions about cautions or convictions of someone living or working in their household.

Data protection

When asking for any criminal record check or self-disclosure of criminal records, employers need to be mindful that, under data protection legislation, they should only be requesting information that they believe is relevant. In addition, the purpose of asking must be set out in their privacy policy, along with the lawful basis and condition of processing.

The national charity, [Unlock](#) has worked with the Information Commissioner's Office (ICO) on [guidance covering data protection and asking for criminal record checks](#). It particularly highlights that:

- collecting criminal records at application stage is unlikely to be necessary and therefore in breach of data protection legislation
- collecting at *any* stage must be justified by a link between purpose and processing

- the employer must identify a lawful basis for processing AND meet a condition of processing
- applicants have data subject rights that must be upheld
- explaining how the employer will uphold applicants' rights is key to meeting the condition of processing.

Employers should have an agreed data protection policy in place that includes the collection of job applicants' personal data, and this should include a specific section on the processing of criminal records data. The policy should clearly identify the purpose of collecting criminal records data, the lawful basis for collecting it, and explain how long they will retain this data, who it will be shared with and the applicants' legal rights in relation to their information.

Unlock stress that employers should only ask job applicants about criminal records if and when they need to. This will not usually be until after a conditional offer of employment has been made.

Further information from the Information Commissioner's Office (ICO)

'At-a-glance' and 'In brief' guidance on criminal offence data

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/criminal-offence-data/>

More detailed guidance aimed at data protection officers and those with specific data protection responsibilities in larger organisations

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/criminal-offence-data/>

Self-disclosure

'Self-disclosure' is when individuals provide an employer with details about their criminal record. Asking applicants to self-disclose has become standard in many recruitment procedures, often with a tick box in the application form or a request for applicants to self-disclose prior to interview.

However, as it has become so standard, employers often fail to consider why they are asking, or whether the information is relevant to the role.

In particular, it may not be necessary at all if the applicant will later undergo a DBS check before their appointment. The risk with self-disclosure is that irrelevant information is collected, perhaps including spent convictions or 'filtered' information that the employer does not need to know about.

Also, if all applicants are asked to self-disclose as part of the application process, a lot of sensitive personal data will be collected by the employer, most of which is likely not to be needed and excessive. The collection, handling and storing of such data will need to comply with data protection legislation.

Sometimes employers may consider self-disclosure as a test of the applicant's honesty when compared to the DBS check, but it may not take account of a person not realising they should disclose something that they mistakenly thought was spent or irrelevant, or disclosing something that they need not have done.

An employer is likely to want any self-disclosure to be verified in any case. And the only way to do that is by a DBS check which makes the request to self-disclose likely to be even more pointless.

However it would be good practice for an employer to give a successful applicant an opportunity to explain the circumstances of a criminal record that may be revealed through self-disclosure or a DBS check once a conditional offer has been made to them, in order to address any concerns the employer might have.

The charity, **Unlock** has more detailed guidance aimed at employers on assessing criminal records and what should be discussed with applicants in a disclosure discussion <https://recruit.unlock.org.uk/knowledgebase/assessing-criminal-records/#additional-questions-might-include>

Types of checks

The different type of DBS checks available in **England and Wales** are:

- a basic check, which shows unspent convictions and conditional cautions
- a standard check, which shows spent and unspent convictions, cautions, reprimands and final warnings
- an enhanced check, which shows the same as a standard check plus any information held by local police that's considered relevant to the role
- an enhanced check with barred lists, which shows the same as an enhanced check plus whether the applicant is on the list of people barred from doing the 'regulated activity' with children or adults.

In **Scotland**, the different types of DBS checks are basic, standard, enhanced and the Protecting Vulnerable Groups (PVG) Scheme certificate.

In **Northern Ireland**, the different types of checks are basic, standard and enhanced with or without a check on the Disclosure and Barring Service (DBS) barred lists.

Basic checks

Any individual can apply for a basic check directly with the DBS or Disclosure Scotland or AccessNI.

An employer can request that a basic check is made for any type of work or volunteering. However, the employer should also have [a written policy on employing ex-offenders](#) available to job applicants. This policy and the need for the basic check should be made clear to any potential applicant before they apply.

The employer should also have an agreed data protection policy in place that covers the collection of job applicants' personal data, and this should include a specific section on the processing of criminal records data. The policy should clearly identify the purpose of collecting criminal records data, the lawful basis for collecting it, and explain how long they will retain this data, who it will be shared with and the applicants' legal rights in relation to their information.

Asking about spent convictions or carrying out a standard or enhanced DBS check would be unlawful for most roles. Unless the role is exempt from the Rehabilitation of Offenders Act 1974, it is crucial that all spent cautions and convictions are ignored by the employer.

It is important that all job applicants who have a criminal record are treated fairly and the employer should not discriminate because of a conviction or other information revealed.

Standard and enhanced checks

Employers can only request standard or enhanced checks or enhanced checks with barred list for specific types of roles such as in healthcare or childcare:

- For standard checks, the position must be included in the Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975 (in Northern Ireland, the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979). This includes doctors, barristers, traffic wardens and probation officers.
- For enhanced checks, the position must be included in both the ROA Exceptions Order and in the Police Act 1997 (Criminal Records) regulations (or Protection of Vulnerable Groups (Scotland) Act 2007). These include jobs working with children and vulnerable adults and taxi driving licences. The application is made by the applicant and counter-signed by a 'registered person'.
- For enhanced checks with children's and/or adults' barred list check(s), the position must be eligible for an enhanced check and be specifically listed in the Police Act 1997 (Criminal Records) regulations as being eligible to check the appropriate barred list(s). In other words, this is a check carried out when someone applies to work in a 'regulated activity' or 'regulated work' with children or adults (see below).

For England and Wales there is an [online tool](https://www.gov.uk/find-out-dbs-check) which helps to find out what type of check is appropriate for the job www.gov.uk/find-out-dbs-check

Further information in Scotland on the different types of checks:

www.mygov.scot/disclosure-types

Further information in Northern Ireland on the different types of checks:

www.nidirect.gov.uk/articles/employer-obligations-and-fair-treatment

The certificate is issued to the individual. The employer will then ask the job applicant for sight of the DBS certificate. They should only retain it to make their decision on whether to offer the job or not. After this they should return it to the applicant.

AccessNI confirms that "Employers shouldn't take or keep photocopies of an applicant's certificate. If there is a reason for keeping a copy, for example there is a dispute or complaint, the employer must explain the reason and get the applicant's permission. Employers should not keep a certificate for longer than six months. If the employer needs to keep the copy longer than six months, they must tell AccessNI."

Where the job applicant for the post is a member of the [DBS update service](#) (see below), the organisation can, with their permission, carry out a status check on any current certificate.

Some old, minor and irrelevant offences and convictions for non-violent, non-sexual offences that did not lead to a custodial sentence are removed from a DBS standard or enhanced certificate in a process known as '**filtering**'. They must not be taken

into account by an employer. However, the conviction or caution is not removed or wiped from the Police National Computer.

The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020, implemented from 28 November 2020 amends criminal record disclosure regime, removing the requirement for youth cautions, reprimands and warnings (received when under 18 years old) to be automatically disclosed on standard and enhanced criminal records checks. In addition the 'multiple conviction' rule, which previously required the automatic disclosure of all convictions where an individual has more than one conviction (regardless of the nature of the offence or sentence), has been abolished. However, a police force may still determine that it is appropriate in the circumstances to include such information in the case of an enhanced criminal record certificate.

These changes were brought about in response to a 2019 Supreme Court decision. A Supreme Court case (*R (on the application of P) v Secretary of State for the Home Department*) ruled that other information provided through DBS checks of youth reprimands and warnings, as well as minor spent convictions, should also be filtered from the DBS process, because they infringe privacy rights under Article 8, European Convention on Human Rights.

Further information:

DBS filtering guide

www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide

In **Northern Ireland**, there are some differences in the arrangement for the disclosure and filtering of certain cautions and convictions as introduced by the [Department of Justice of Northern Ireland](#).

In **Scotland**, the qualifying conditions for the equivalent of 'filtering' differs slightly under the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015.

Employers requiring standard or enhanced checks should have a [written policy on employing ex-offenders](#) available to job applicants on request in order to be compliant with the [DBS Code of Practice](#) (or [AccessNI's Code of Practice](#) in Northern Ireland, [Disclosure Scotland Code of Practice](#) in Scotland).

This policy and the need for the DBS check should be made clear to any potential applicant and the possible impact of having a criminal record before they apply. The employer should also discuss with candidates the content of any disclosure before withdrawing any job offer.

It is important that all job applicants who have a criminal record are treated fairly and the employer should not discriminate because of a conviction or other information revealed.

However, it is unlawful for somebody who is barred from undertaking a regulated activity to do this type of work.

Under the Disclosure (Scotland) Act 2020 currently being implemented, it is an offence for an individual to work, or apply to work, in a regulated role with children and/or adults if they are not a member of the [Protecting Vulnerable Groups \(PVG\) scheme](#).

What is regulated activity?

The UK government describes regulated activity as “work that a barred person must not do. However, it excludes any activity carried out in the course of family relationships, and personal, non-commercial relationships.”

So it does not cover any informal activity carried out for friends or family or that are personal, non-commercial relationships.

[Regulated activities with adults](#), as defined by the Safeguarding Vulnerable Groups Act 2006 and amended in 2012 are:

- Providing health care by, or under the direction or supervision of, a regulated health care professional
- Providing personal care made up of: – physical assistance with eating, drinking, toileting, washing, bathing, dressing, oral care or the care of skin, hair or nails for adults who can't carry this out themselves because of age, illness or disability – prompting and then supervising with eating, drinking, toileting, washing, bathing, dressing, oral care or the care of skin, hair or nails for adults who can't decide to do this for themselves because of age, illness or disability – training, instructing, providing advice or providing guidance on how to physically assist an adult with eating, drinking, toileting, washing, bathing, dressing, oral care or the care of skin, hair or nails for adults who can't carry this out themselves because of age, illness or disability
- Providing social work by a social care worker to an adult who is a client or potential client
- Assisting an adult who can't manage themselves because of their age, illness or disability with the day-to-day running of their household relating to: – managing the adult's cash; – paying the adult's bills; – shopping.
- Assistance in the conduct of an adult's own affairs, where: – a lasting power of attorney is created – an enduring power of attorney is registered or applied for – the Court of Protection has made an order in relation to the making of decisions on the adult's behalf – an independent mental health or mental capacity advocate is appointed – independent advocacy services are provided – a representative is appointed to receive benefits payments on the adult's behalf

- Conveying adults to, from or between health care, personal care and/or social work services who can't convey themselves because of their age, illness or disability
- Day to day management or supervision of anyone carrying out the above activities.

There is no longer a requirement for a person to carry out defined activities with adults a certain number of times before they are engaging in regulated activity.

[Regulated activities with children](#) as defined in the Safeguarding Vulnerable Groups Act 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, both as amended are:

- Teaching, training or instruction, care or supervision of children
- Moderating a web service wholly or mainly for children
- Advice or guidance wholly or mainly to children
- Driving a vehicle for children
- Health care or personal care
- Registering to be a foster carer or private foster carer
- Registering to be a childminder or child care provider, including voluntary registration.

It also includes other types of work carried out in certain establishments under certain circumstances:

- An educational institution exclusively or mainly for the provision of full time education of children
- A pupil referral unit
- A provider of nursery education
- A detention centre for children
- A children's home or a home provided under the Children Act 1989
- A children's centre
- Relevant childcare premises.

Children are defined as under the age of 18 or under the age of 16 if an activity relates solely to their employment e.g. induction training when starting work.

Some supervised activity (dependent on what the activity is or where it takes place) is excluded from regulated activity. So, in some circumstances, if an individual undertakes an activity with children but is under reasonable day-to-day supervision by another person who is engaging in regulated activity, they are not included in the regulated activity list.

Further information:

Eligibility guidance for enhanced DBS checks

www.gov.uk/government/publications/dbs-workforce-guidance

Supervision of activity with children

www.gov.uk/government/publications/supervision-of-activity-with-children

There are also some **specified positions in Wales** that come under regulated activity.

In Scotland regulated work is similar under the Protecting Vulnerable Groups (PVG) scheme, as is the **regulated activity in Northern Ireland**.

Employers may still choose to request criminal record checks for roles that are not regulated activity/work. However, they cannot subject them to barred list checks.

How long is the DBS check valid?

In England and Wales, a DBS check has no official expiry date. However, the information included on the check is only sure to be accurate at the particular time the check was carried out. It gives a snapshot of the worker's criminal record and eligibility to undertake regulated activity/work only at that specific time. It will be up to the employer to decide when a new check is needed.

Most employers will ask for a new enhanced disclosure certificate from successful job applicants, even if the worker already has one when they are offered a new job. This is to ensure the information on the enhanced disclosure certificate is up to date. Employers may also ask the worker for a fresh check of the DBS Childrens' and/or Adults' barred list in accordance with sector-specific guidance.

However workers in England and Wales can register for the **DBS update service** for standard or enhanced DBS checks which keeps the DBS certificates up to date and allows employers to check if anything changes on their certificate (if they have the worker's permission.)

In Northern Ireland, the disclosure certificate is valid during the recruitment process for a specific role or job. Information about the individual's criminal record history is only accurate on the day the certificate was issued. Workers cannot transfer a disclosure certificate from one role to another.

AccessNI does not operate an update service. Therefore, employers in Northern Ireland are likely to ask the worker for a fresh check of the DBS Childrens' and/or Adults' list in accordance with sector-specific guidance.

AccessNI confirms that "An employer decides if they want to have a re-checking policy and intervals for re-checking. Some employers recheck every two or three years. Others rely on employees declaring any changes to their criminal records."

Workers **in Scotland** who are registered under the **Protecting Vulnerable Groups scheme**, will have their suitability to continue working with children or protected

adults continually checked by Disclosure Scotland. If they find new information, which means someone might have become unsuitable to work with children or protected adults, they will notify their employer.

A PVG Scheme member's paper certificate shows the information available on the day it was created. Membership of the PVG scheme lasts forever though, and scheme members are continuously checked, unless they decide to leave the scheme.

What is the cost of DBS checks and who should pay?

In England and Wales, basic and standard checks costs £23, enhanced and enhanced checks with barred lists cost £40 and the cost for the DBS update service is £13 per year.

In Scotland, basic, standard and enhanced checks cost £25 and the Protecting Vulnerable Groups scheme including vetting costs £59.

In Northern Ireland, the cost for basic and standard checks is £18 and for enhanced checks is £33.

The 'responsible organisation' or 'registered body' who is registered with DBS, AccessNI or Disclosure Scotland to process the check, may also charge an administration fee.

There is no charge to volunteers for DBS checks or for the update service.

Employers may vary as to whether or not they expect successful applicants to pay for the disclosure and vetting check. However, it would be best practice for employers to cover this cost within their overall recruitment expenditure. The charge could have considerable impact on workers particularly those who may be low paid and may deter job applicants.

How long does the check take?

The check usually takes around 8 weeks **in England and Wales** but it can take longer if:

- the details given for the check are incorrect
- several police forces need to be involved in the check.

However, employers who are providing adult care services can get an initial response usually within 2 days with **DBS Adult First** for an extra charge of £6. This will confirm if the applicant:

- can start work, as long as they're supervised
- should wait for the results of an enhanced check.

Checks **in Northern Ireland and Scotland** can be much quicker. For example, 98% of enhanced checks should be processed within 28 days, the average being 5 days

to process (as of 23 August 2021) in Northern Ireland. In Scotland, 90% of disclosure applications are completed within 14 days (as listed in December 2020).

What if the worker has lived abroad?

DBS checks will not cover the time someone has lived outside the UK. DBS cannot access criminal records held overseas. In a small number of cases, overseas criminal records are held on the Police National Computer (PNC) and these would be revealed as part of a criminal record check.

Employers are advised to check the overseas criminal record of people they are recruiting from abroad, by contacting the embassy or High Commission of the country in question.

The application process for criminal records checks or 'Certificates of Good Character' for someone from overseas varies from country to country. Employers will have to apply in the country or to the relevant embassy in the UK.

Further information:

www.gov.uk/government/publications/criminal-records-checks-for-overseas-applicants

In Northern Ireland, AccessNI cannot access criminal records held overseas, unless the applicant is doing regulated work with children and is:

- German
- Lithuanian
- Portuguese
- Spanish
- French
- Italian
- Slovakian
- Bulgarian
- Hungarian
- Latvian
- Polish
- Romanian
- Czech
- Greek
- Dutch.

In Scotland, Disclosure Scotland, under the Protecting Vulnerable Groups scheme, can check the criminal history information of the individual held in the UK, and from their country of nationality, if their nationality is one of the following:

- Germany
- Lithuania
- Netherlands
- Portugal
- Romania
- Hungary
- Greece
- France
- Ireland
- Italy
- Spain
- Poland.

There are some statutory requirements for employers to carry out checks on prospective employees who have spent time abroad, in the health and education sectors but elsewhere it is only best practice to do so.

What if the worker is transgender?

Transgender job applicants may not want to reveal their gender history to a potential employer.

In England and Wales they can instead contact the **DBS transgender applications team** at sensitive@dbs.gov.uk, telephone: 0151 676 1452, Monday to Friday, 9am to 5pm.

In Northern Ireland, AccessNI has a special application process. They will need to contact the Operations Manager in AccessNI at ani@accessni.gov.uk, telephone 0300 200 7888.

Individuals who are transgender and applying for a disclosure **in Scotland** can also apply using [a special process](#). This means they only have to tell Disclosure Scotland their birth gender and do not have to tell the person or organisation asking for the disclosure. The applicant will need to write to the Vetting Operations Manager at Disclosure Scotland, P.O. Box 250, Glasgow G51 1YU and mark the envelope 'Private and confidential' and/or 'To be opened by the addressee only'.

Disregarding historical convictions for consensual gay sex

Men with historical convictions for consensual gay sex may apply to have their convictions disregarded (deleted or where not possible annotated) and pardoned. Where the convictions are disregarded they will no longer be disclosed on Disclosure and Barring Service certificates or in court proceedings.

Further information:

Disregards and pardons for historical gay sexual convictions **(England and Wales)**
www.gov.uk/government/publications/disregarding-convictions-for-decriminalised-sexual-offences

Pardons and disregards for homosexual offences **(Northern Ireland)**
www.nidirect.gov.uk/articles/pardons-and-disregards-homosexual-offences

In Scotland, the Scottish government has given an automatic pardon to all men with convictions for same-sex sexual activity that is now legal as the government accepts these convictions were discriminatory and should never have happened.

However, these convictions could still show up on records, so individuals will need to apply for a 'disregard' if they want to remove a conviction for sexual activity with another man from their records.

Further information:

Pardons and disregards for convictions for sexual activity between men **(Scotland)**
www.gov.scot/publications/remove-historical-conviction-for-sexual-activity-between-men/

Employer's legal duties

Employers are responsible for knowing when a job or volunteering role requires a criminal records check. If employers ask about criminal records they should be able to show that it is both **necessary** and **proportionate** and complies with data protection legislation.

Employers who provide regulated activity (or regulated work in Scotland) can request an enhanced DBS check when someone is engaged or hired to undertake work that is regulated activity with children or adults. The UK legislation only provide eligibility for DBS checks; they do not make them a requirement.

However, an employer who engages or hires someone who is barred to undertake regulated activity (or regulated work in Scotland) is breaking the law.

Because of this, organisations **in England and Wales** who undertake regulated activity should only employ people if they have an enhanced check and DBS check with the barred lists.

In Northern Ireland, organisations who undertake regulated activity should only employ people if they have an enhanced check from AccessNI, together with a check of the barred lists held by the Disclosure and Barring Service and the Scottish government.

In Scotland, organisations who undertake regulated work should only employ members of the PVG scheme in order to make sure they are allowed to do this type of work before they are employed. Under the Disclosure (Scotland) Act 2020 currently being implemented, it is an offence for an employer to offer a regulated role to an individual without first receiving confirmation from Disclosure Scotland that the individual is a member of the PVG scheme.

Questions about criminal records should only be asked once a job offer has been made. The offer can be made conditional on the outcome of a criminal records check.

Employers who provide regulated activity (or regulated work in Scotland) have a legal duty to refer an individual to the DBS (or Disclosure Scotland in Scotland) if they:

- dismissed them because they harmed someone
- dismissed them or changed their role because they might have harmed someone
- planned to dismiss them for either of these reasons, but they resigned first.

Further details in the section below 'The referral and barring process'.

It is unlawful for an employer to require a worker to obtain a copy of their full criminal record directly from the police using a data subject access request under data

protection legislation. It is a criminal offence to force job applicants to reveal spent convictions in this way.

The referral process

Regulated activity providers (employers or volunteer managers of people working in regulated activity **in England, Wales and Northern Ireland**) and personnel suppliers (such as employment agencies) have a legal duty to refer a person to DBS if they have:

- withdrawn permission for a person to engage in regulated activity with children and / or vulnerable adults. Or they move the person to another area of work that isn't regulated activity. This includes situations when they would have taken the above action, but the person was re-deployed, resigned, retired, or left. For example, a teacher resigns when an allegation of harm to a student is first made

and

- they think the person has engaged in relevant conduct (such as if it is likely to endanger a child or adult or is of a sexual nature involving a child) in relation to children and/or adults. An action or inaction has harmed a child or vulnerable adult or put them at risk or harm or
- satisfied the harm test in relation to children and / or vulnerable adults e.g. there has been no relevant conduct but a risk of harm to a child or vulnerable still exists or
- been cautioned or convicted of a relevant (automatic barring either with or without the right to make representations) offence.

This duty applies even when a referral has also been made to a local authority safeguarding team or professional regulator.

Where a person has been cautioned or convicted for a 'relevant offence' as set out in legislation or they have been issued with a Risk of Sexual Harm Order and the details have been provided to DBS by the Home Office, the person will be automatically barred.

Further information:

Making barring referrals to the DBS

www.gov.uk/guidance/making-barring-referrals-to-the-dbs

DBS referrals guide: referral and decision-making process

www.gov.uk/government/publications/dbs-referral-and-barring-decision-making-process/dbs-referrals-guide-referral-and-decision-making-process

In Scotland, employers with employees or volunteers doing 'regulated work' have a duty to report any harmful behaviour that might affect whether the person is allowed to work with children or protected adults to Disclosure Scotland.

This applies whether the person is a member of the Protecting Vulnerable Groups scheme or not.

Further information:

Make a referral to Disclosure Scotland
www.mygov.scot/pvg-referrals/

If a member has been referred to the Disclosure and Barring Service or Disclosure Scotland and has asked for support and guidance from UNISON, the branch should contact their regional organiser (www.unison.org.uk/regions) for advice.

The barred lists

An individual who is included on a barred list will be breaking the law if they seek to work in regulated activity with a group from which they are barred. Likewise, employers will be breaking the law if they knowingly employ somebody who is on a barred list.

There are two barred lists: the Children's barred list and the Adults' barred list, both maintained by the Disclosure and Barring Service (DBS).

Further information:

DBS barring referral guidance www.gov.uk/government/collections/dbs-referrals-guidance--2

When the DBS is advised of a relevant conviction, caution or other information indicating that an individual may pose some risk of harm to children or vulnerable adults, it will formally notify the individual in writing. There are two types of formal notification: notification of inclusion in a barred list and notification of 'minded to bar'.

Where the DBS is minded to include someone in a barred list, the individual can make representations to the DBS to explain why they feel it would be inappropriate or disproportionate to be included in one or both barred lists.

Individuals can also make representations if they know that a referral has been made about them.

Further information:

Making representations www.gov.uk/government/publications/dbs-referral-guide-making-representations/dbs-barring-and-referrals-making-representations

In **Scotland**, people who are unsuitable to do regulated work with children or protected adults is 'listed' on either or both the children and adult lists kept by Disclosure Scotland.

As well as referral from a former employer or regulatory body, Disclosure Scotland may receive information about a conviction from the police or the Scottish Court Service.

Further information:

Scottish government www.mygov.scot/pvg-scheme-lists/children-and-adults-lists/

Automatic barring (autobar)

Where a person has been cautioned or convicted for a 'relevant offence' or been issued with a Risk of Sexual Harm Order and the details have been provided to DBS by the Home Office, the person will be automatically barred.

Relevant offences are set out in legislation and DBS must include a person who is cautioned or convicted for one of these offences in the barred list.

An individual who has been convicted of an 'Autobar' offence does not have any opportunity to make representations for removal due to the seriousness of the offence.

Further information:

UK government www.gov.uk/government/publications/dbs-referral-and-barring-decision-making-process/dbs-referrals-guide-referral-and-decision-making-process

In Scotland www.mygov.scot/pvg-scheme-lists

If something is wrong with a disclosure certificate

Workers can raise a dispute for a standard or enhanced check directly with the DBS (or AccessNI in Northern Ireland or Disclosure Scotland in Scotland) if they believe there's been a mistake in either:

- the records provided, like wrong or irrelevant information on convictions
- personal information, like their name.

The error should be reported within 3 months of the date on the certificate.

Further information:

Dispute a mistake on your DBS certificate **(England and Wales)**

www.gov.uk/report-problem-criminal-record-certificate/dispute-a-mistake

Disputing an AccessNI certificate **(Northern Ireland)**

www.nidirect.gov.uk/articles/disputing-accessni-certificate

If something is wrong with your disclosure certificate **(Scotland)**

www.mygov.scot/disclosure-dispute/

Enhanced checks also include 'other relevant information' that will come from a police force's local record of information, as decided by the Chief Police Officer. It can include:

- Fixed Penalty Notices (FPN's)
- Penalty Notices for Disorder (PND's)
- Findings of innocence
- Acquittals
- Cautions and convictions of those that you live with
- Other Police intelligence (including allegations).

Further information:

Including how an individual can try to stop police information from being disclosed on an enhanced check

<https://hub.unlock.org.uk/knowledgebase/local-police-information-2/>

If a member has a concern about the accuracy of information on their disclosure certificate, the branch should contact their regional organiser for advice

(www.unison.org.uk/regions).

Quick checklist

- Does the recruitment process include a request for applicants to self-disclose criminal records? Is it necessary to self-disclose, particularly if the employer will ask any preferred candidate for a DBS check (or equivalent in Scotland or Northern Ireland)?
- Does the recruitment process include a request for applicants to undergo a DBS check (or equivalent in Scotland via Disclosure Scotland or in Northern Ireland via AccessNI)? Is this relevant and appropriate to the role?
- Is the DBS check (or equivalent in Scotland via Disclosure Scotland or in Northern Ireland via AccessNI) asked before a conditional offer of employment is made, so that there is an unnecessary collection of sensitive personal data from all applicants? The job offer can be made conditional on the outcome of a criminal records check. Checks should only be made once a job offer has been made.
- Is there a clear reason why a criminal record check is needed for the role?
- Does the job involve 'regulated activity / regulated work'?
- Is the employer clear about the type of criminal records check and barring check (if relevant) that will be required for the role to all potential job applicants?
- Only certain types of roles allow an employer to ask the applicant to disclose spent as well as unspent convictions, cautions, reprimands and final warnings. In most cases, the right to conceal a spent conviction is a statutory right. Are the levels of checks (basic, standard, enhanced, checking against the barred list) appropriate to the role?
- If the role is not exempt from the Rehabilitation of Offenders Act 1974, does the employer make it clear that spent criminal records do not need to be disclosed, and if disclosed will be ignored?
- If the role is exempt from the Rehabilitation of Offenders Act 1974, does the employer make it clear that both unspent and spent convictions might need to be disclosed, although cautions and convictions that are 'filtered' (or 'protected') do not need to be disclosed?
- Are checks made on all postholders in that role or just certain individuals (which could be unfair and potentially discriminatory)?
- Does the employer explain the potential impact of having a criminal record?
- Does the employer pay the application fee for criminal records checks and any updates for their workers? Employing the right person with the right skills is a normal part of any recruitment process, and having checks and updates represents a benefit to the employer.

- Does the employer only ask for sight of the DBS certificate in order to make the recruitment decision and does not photocopy it nor retain it unnecessarily?
- Whilst the protection and safeguarding of children and/or adults are the employer's primary concern, does the employer also make clear to job applicants that not all criminal convictions will be a bar to employment, and will act in a proportionate manner when deciding whether or not to proceed with appointment to a post?
- Will the employer discuss with the job applicant the content of any disclosure before withdrawing any job offer? They should give the applicant a chance to explain if a check reveals a criminal record or other information about them.
- Similarly, will the employer discuss with the worker the content of any update checks and give them a chance to explain if a criminal record or other information is revealed?
- Will the employer allow the employee to be accompanied by their union rep at meetings with the employer to discuss disclosure and barring issues?
- How is the criminal records and barring check information to be securely stored and who will have access to it? Does the collection, storage and use of the information comply with data protection legislation and is it used only for the recruitment process?
- Does the employer have an agreed data protection policy that covers the collection of job applicants' personal data, and includes a specific section on the processing of criminal records data?
- Does the employer include a statement on application forms where there is reference to the need for criminal record checks, that reassures applicants about privacy and confidentiality?
- Do employers respect the privacy of transgender employees, and ensure that information about an employee's gender history is kept confidential? Does the employer make all job applicants aware of the contact details of the DBS / AccessNI / Disclosure Scotland sensitive applications team?
- Where the job applicant or worker is a member of the DBS update service or PVG scheme, does the employer ask the individual's permission before carrying out a status check?
- Are decisions on when updates on checks or when new checks are needed reasonable and appropriate to the role?
- Does the employer have an agreed policy on the recruitment of ex-offenders? Is this drawn to the attention of job applicants?
- Does the employer have an agreed policy on the recruitment of people to work with children and/or vulnerable adults and checking on the criminal records of workers? Does this include a referrals policy?

More information

Check someone's criminal record as an employer **(England and Wales)**

www.gov.uk/dbs-check-applicant-criminal-record

DBS guidance leaflets relating to eligibility, regulated activity and other DBS services and products **(England and Wales)**

www.gov.uk/government/publications/dbs-guidance-leaflets

DBS sample policy on the recruitment of ex offenders **(England and Wales)**

www.gov.uk/government/publications/dbs-sample-policy-on-the-recruitment-of-ex-offenders

Disclosure and criminal records checks **(Scotland)**

www.mygov.scot/browse/working-jobs/finding-a-job/disclosure

Protecting vulnerable groups (PVG) scheme **(Scotland)**

www.mygov.scot/pvg-scheme

Criminal record checks **(Northern Ireland)**

www.nidirect.gov.uk/campaigns/accessni-criminal-record-checks

Safeguarding vulnerable groups **(Northern Ireland)**

www.health-ni.gov.uk/articles/safeguarding-vulnerable-groups-disclosure-and-barring-service

Employer obligations and fair treatment **(Northern Ireland)**

www.nidirect.gov.uk/articles/employer-obligations-and-fair-treatment

Guides, forms and templates for AccessNI employers **(Northern Ireland)**

www.nidirect.gov.uk/articles/guides-forms-and-templates-accessni-employers

Unlock - an independent national charity that provides a voice and support for people who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence.

www.unlock.org.uk

Principles of Fair Chance Recruitment: Guidelines on recruiting people with convictions and dealing with criminal records fairly

<https://recruit.unlock.org.uk/fair-chance-recruitment/principles/>