

## LCCSA BRIEFING NOTE

### DISCLOSURE OF CRIMINAL RECORDS

The recent decision of the Supreme Court in the case of *P, G & W V Secretary of State for the Home Department* [2019] UKSC 3 considered the criminal records disclosure regime. Now is therefore a good time to remind practitioners of the main points of the disclosure regime and to summarise the effect of the decision.

There are two disclosure regimes that operate in parallel to each other – one under the Rehabilitation of Offenders Act 1974 (ROA) and the other under Part V of the Police Act 1997. The former governs when an individual has to “self-disclose” their criminal record and the latter governs disclosure of an individual’s criminal record via the various certificates issued by the Disclosure & Barring Service (DBS).

In summary, the ROA regime stipulates that an individual does not have to disclose the existence of convictions or cautions on their record after a certain amount of time, known as a “rehabilitation period”, has elapsed since the case was disposed of. After the expiration of the rehabilitation period the offence becomes “spent” and need not be disclosed. The length of the rehabilitation period is dependent upon the way in which the case was disposed of. The main rehabilitation periods are here:

Sentence	Rehabilitation Period	
	Over 18 at date of conviction	Under 18 at date of conviction
4 years’ imprisonment or over	Never spent	Never spent
Community Order & Youth Rehabilitation Order	Full length of the Order plus 1 year	Full length of the Order plus 6 months
Fine	1 year	6 months
Conditional Discharge	Full length of the discharge period	Full length of the discharge period
Simple Caution or Youth Caution	Spent immediately	Spent immediately

For a complete list of rehabilitation periods and guidance follow this link:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299916/rehabilitation-of-offenders-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf)

The protection from the requirement to disclose is subject to certain exceptions and the protection of non-disclosure is removed in specified circumstances. In particular, the protection is removed in relation to questions asked in order to assess suitability for employment in the various positions listed in Schedule 1 of The Rehabilitation of Offenders Act (Exceptions) Order 1975 SI 1023 of 1975 <https://www.legislation.gov.uk/uksi/1975/1023/schedule/1/made> (as amended by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 (SI 2013/1198 <http://www.legislation.gov.uk/uksi/2013/1198/article/11/made>) and in relation to applications for jobs working with children and vulnerable adults. Questions asked of candidates for employment in these fields are therefore not subject to the ROA which means that an individual who applies for positions in these areas must self-disclose convictions and cautions even if they are spent, but they will not have to disclose certain convictions and cautions if they are classified as “protected” (see below).

The convictions and cautions eligible for disclosure by the DBS on standard and enhanced certificates are governed by Part V Police Act 1997 <http://www.legislation.gov.uk/ukpga/1997/50/part/V> (as amended by (1) The Police Act 1997 (Criminal Records) Regulations 2002 (SI 2002/233)

<http://www.legislation.gov.uk/ukxi/2002/233/contents/made> and (2) The Police Act 1997 (Criminal Records) (Amendment) Regulations 2006 (SI 2006/748) <http://www.legislation.gov.uk/ukxi/2006/748/contents/made> and (3) Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013(SI 2013/1200) <http://www.legislation.gov.uk/ukxi/2013/1200/contents/made>). The rules created by the disclosure regime are known as the “filtering” rules and, in summary, operate as follows:

- A caution received when 18 years of age or over will not be disclosed if six years have elapsed since the date of issue and if it does not appear on the list of specified offences which must always be disclosed.
- A caution received when under 18 years of age will not be disclosed if 2 years have elapsed since the date of issue, but only if it does not appear on the list of specified offences which must always be disclosed.
- A conviction received when 18 years of age or over will not be disclosed only if 11 years have elapsed since the date of conviction, it is the only conviction on record and it did not result in a custodial sentence and does not appear on the list of specified offences which must always be disclosed. If there is more than one conviction on record, for *any* offence, then details of all convictions will be disclosed.
- A conviction received when under 18 years of age will not be disclosed only if 5.5 years have elapsed since the date of conviction, it is the only conviction on record and it did not result in a custodial sentence. Even then, it will only be filtered if it does not appear on the list of specified offences which must always be disclosed. If there is more than one conviction on record, for *any* offence, then details of all convictions will be disclosed.

The filtering rules under the Police Act 1997 mirror those in relation to “protected” convictions and cautions under the ROA, therefore they apply to self-disclosure as well as disclosure by the DBS.

For a full list of offences that will never be filtered follow this link: <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check>

The Supreme Court in the P, G & W case found the rule that stipulates that all convictions must be disclosed if there is more than one conviction to be disproportionate and incompatible with Article 8 ECHR. It also held that the disclosure of reprimands / warnings / youth cautions was also disproportionate and incompatible with Article 8 ECHR. Practitioners should note however that the decision does not alter the operation of the disclosure scheme as it currently stands. Further legislation will be required to enable that to happen and the LCCSA will be pressing for meaningful reform in this area.

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