Safeguarding and the Rehabilitation of Offenders

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Some organisations - Churches and religious charities are a good example - actively promote the rehabilitation of offenders either through engaging them in their community or involving these individuals in their work or projects. This note examines the issues that sometimes arise between an organisation's safeguarding practices and their obligations under the Rehabilitation of Offenders Act 1974.

The starting point is that good safeguarding practice is now a priority for most organisations. Many will have detailed recruitment policies in place that set out the type of DBS check, application for and process and, in some cases, risk assessment procedures that apply when a person seeks to work with children or adults at risk.

Organisations need to understand the extent to which they can check criminal records and use information on past convictions. Whilst safeguarding is a top priority, organisations need to be aware that it may be unlawful to exclude or dismiss an individual from an occupation or employment on the basis of previous spent convictions, and that to do so could give rise to a civil claim. It is also a criminal offence to make an unauthorised disclosure to third parties of spent cautions.

1. Which check?

Asking a person to disclose criminal convictions is still a key part of most recruitment processes. An organisation must only carry out checks in respect of individuals in an occupation or employment who are eligible for the check. To ascertain to whom this applies, it is necessary to look at the rules relating to DBS checks.

There are four levels of disclosure that the DBS can provide, and in order of increasing thoroughness, these are: basic, standard, enhanced and enhanced with a check of the barred lists.

*Basic*

A basic DBS check will reveal information about unspent convictions only.

*Standard*

A standard check will disclose spent and unspent convictions and cautions, reprimands and final warnings. A standard check can be applied for only in relation to positions included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("Exceptions Order"). These positions fall, broadly, into five groups: (i) professionals; (ii) those employed to uphold the law; (iii) certain regulated...
occupations (financial services, taxi drivers, care nurses, etc.); (iv) those working with children; and (v) those whose work could pose a risk to national security.

Enhanced

An enhanced check will, in addition to the information provided with a standard check, include any information held by the Police that is "reasonably considered relevant to the workforce being applied for". Enhanced checks can only be applied for if the position in question is included in the Exceptions Order and the Police Act 1997 (Criminal Records) Regulations 2002 ("Police Act Regulations"). This includes certain work with adults at risk and work with children.

Enhanced with barred list

A barred list check will reveal whether or not the individual has been placed on the DBS lists of people unsuitable for working with children or with adults at risk. A barred list check can only be carried out if the position is eligible for an enhanced check and is also specifically listed in the Police Act Regulations as eligible for a check against the appropriate barred list(s). Such positions relate to certain "regulated activities" – for example: the teaching, training, care or supervision of children; or work for certain establishments, including schools, children's homes and childcare premises. In these circumstances, a barred list check is mandatory, because it is an offence to permit an individual to engage in a regulated activity from which one knows, or has reason to believe, that individual to be barred.

2. Consequences of requesting the wrong type of check

It is a criminal offence knowingly to submit an application for a DBS check which is not eligible. If an organisation does not use its reasonable endeavours to ensure that each individual application that is submitted is eligible for the level of check requested, or, if it breaches the DBS Conditions of Registration in any way, then the DBS can remove the organisation as a registered body. That would mean an organisation could no longer carry out a check, with severe consequences therefore.

3. Having ascertained and obtained the correct level of check how can evidence of a criminal record be treated?

As mentioned above, it is an offence to permit an individual to engage in a regulated activity from which one knows, or has reason to believe, that individual to be barred. If a criminal record check reveals that the individual is barred from working with either children or adults at risk, then this must not be permitted. In addition, if a criminal record is disclosed, then the rules on what the organisation is permitted to consider in its response are as follows. If:

(a) the position is not eligible for any DBS check, then the organisation may consider unspent convictions only;

(b) a conviction is spent but the position falls within the Exceptions Order, then the organisation may refuse to employ or engage the person;

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(c) a conviction is spent but the position does not fall within the Exceptions Order, the organisation is prohibited from excluding or dismissing the person on that basis (and a dismissal based on a spent conviction will more than likely be deemed unfair);

(d) a conviction or caution falls under the new category of “protected”, it will not even be disclosed on an enhanced DBS check. An organisation will never be entitled to take into account these “protected” convictions and cautions, regardless of the individual’s role and of his or her level of contact with children or adults at risk.

Subject to the above rules, an organisation should use its own judgment and exercise caution when considering an individual’s full criminal history. When the organisation is exercising its judgement in relation to convictions that it is permitted to take into account, it is good practice to consider:

• the relevance of the conviction to the position in question;

• the seriousness of the offence;

• the length of time that has elapsed since the offence;

• whether there is a pattern of offending;

• whether the individual’s circumstances have changed since the offending behaviour; and

• the circumstances surrounding the offence, including any explanation offered by the individual.

4. Risk assessments and criminal records

Organisations should ensure that when carrying out risk assessments they only ask individuals to disclose previous cautions or convictions which would be disclosed in the DBS check for which they are eligible. For those individuals who are eligible for an enhanced DBS check, organisations may wish to ask a question along the following lines: “Do you have any convictions, cautions, reprimands or final warnings that are not “protected” as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in 2013)?”

5. Ex-offenders Policy

All organisations registered with DBS are required to have a policy on the recruitment of ex-offenders, and any information which is disclosed by way of a risk assessment or DBS check should only ever be used in line with this policy.

The interplay between good safeguarding practice and rehabilitation of offenders is particularly complex and requires an analysis of a number of different pieces of legislation. Detailed legal advice should be taken when drafting a policy for an organisation and/or dealing with recruitment of ex-offenders.