

Discretionary filtering for standard and enhanced DBS checks

The filtering system should, principally, be an automatic process that gives clarity and certainty. However, any system wholly dependent on automatic rules, without discretion or review, will be inflexible and disproportionate, with people on the margins unfairly affected. An automated system can never take into account an individual's circumstances or any positive steps they have taken since.

Further, the current filtering rules require that any criminal records not filtered by the rules are disclosed for all specified jobs and training placements. That means a job as an accountant requires the same level of disclosure as a job working with children and the employer or training provider must make their own assessment of relevance. This is a lot to ask and we think that a system of discretionary review, conducted by appropriately qualified and experienced decision makers, could enable people who have made sustained and significant efforts to change their lives to move on positively in their lives.

How could discretionary filtering work in practice?

Unlock have identified two potential mechanisms through which discretionary filtering could be applied.

The first is an extension of the existing quality assurance framework for enhanced checks. Currently the police assess individual DBS applications and apply a discretionary filtering process, determining whether unfiltered convictions/cautions are relevant to the role (and so disclosed) or not relevant (and so not disclosed).

Decisions are subject to review by the Independent Monitor (IM).¹ Appointed by the Secretary of State under section 119B of the Police Act 1997, the IM has two statutory duties relating to the disclosure of information on a person's Enhanced Criminal Records Certificate. These are to:

- review a sample of cases in which police non-conviction information is included, or not included, on Enhanced Criminal Record Certificates, to ensure compliance with Home Office Statutory Guidance on disclosure and Article 8 of the European Convention of Human Rights (ECHR).
- consider those cases where a person believes information disclosed by police on an Enhanced Criminal Records Certificate is either not relevant to the workforce they are applying for, or that it ought not be disclosed.

¹ <https://www.gov.uk/government/publications/annual-report-for-the-independent-monitor-2019>

Both Scotland and Northern Ireland have established systems that combine automatic rules and discretionary processes.

- Disclosure Scotland provides a review mechanism for certain offences that are not automatically filtered from disclosure, and individuals can apply to a sheriff to have certain information removed from their disclosure certificate if they think it is not relevant to the role for which they are applying.
- Northern Ireland is currently the only region of the UK to provide screening of criminal record information through an Independent Reviewer (IR). The IR can review criminal record information disclosed by Access NI on Standard or Enhanced checks. A review is triggered:
 - o Automatically before a certificate is issued, where all of the criminal record information on that certificate relates to offences before a person's 18th birthday; and/or
 - o After a certificate is issued, where the applicant asks for such a review.

Following a review, the IR can decide that none, some or all of the information should be disclosed on the certificate. If the certificate has already been issued and the IR decides information should be redacted, a new certificate is issued.

In England and Wales this function could be carried out by the Independent Monitor, receiving appeals from applicants that believe information is no longer relevant and so shouldn't be disclosed – decisions could be made to apply to allow future disclosures, or just the current disclosure.

The relative size of the population in England and Wales, compared to Scotland or Northern Ireland, would create a need for the IM to be better resourced to make assessments. The Home Office would need to undertake an assessment of the costs of introducing a discretionary filtering process. We recommend funding this through the existing DBS system, which is financed primarily by employers and applicants. In addition to the fixed fee charged by the DBS (employers pay an additional cost if they use the services of an umbrella body). A small rise in the fixed cost of DBS checks (e.g. 50p per check) could cover the additional resources of an expanded role for the Independent Monitor. As of the end of the financial year 2019/20, the DBS reported a cash balance of £60m.²

² DBS (2020) Disclosure and Barring Service Annual Report and Accounts
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909239/DBS_ARA_2019-20_.pdf