

# Bird & Bird & Criminal record checks

## Everything you need to know

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# Welcome

## Speakers

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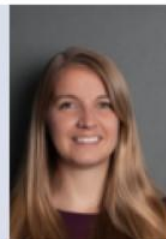


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### **Helen Chandler**

Head of Partnership and Engagement

Disclosure and Barring Service

# What we will cover



Criminal offence data



Background screening



Disclosure certificates



Data protection



Employment law

# What is criminal offence data?

# Broad definition

## Data Protection Act 2018

- Criminal convictions and offences
- Related security measures
- Alleged commission of offences
- Proceedings for an offence committed or alleged to have been committed
- Disposal of proceedings, including sentencing

Non-exhaustive!

## ICO Guidance

- Suspicions and allegations of offences
- Absence of convictions
- Victims and witnesses

## Related security measures

- Cautions
- Bail conditions
- Probation/parole information
- Electronic tagging data
- Behaviour orders and restraining orders

# Examples



## Example

A shop manager suspects an employee of stealing money from the till. The manager compiles a report showing the shifts of the individual and collects CCTV footage of them at the till during those shifts.

This personal data is criminal offence data as it relates to the alleged commission of an offence which is as yet unproven.



## Example

A school employs a teacher following a clear criminal records check. They keep this result in their personnel files. This data 'relates to' criminal convictions and so collecting and holding it means the school is processing criminal offence data. This applies even though the check does not reveal any convictions.



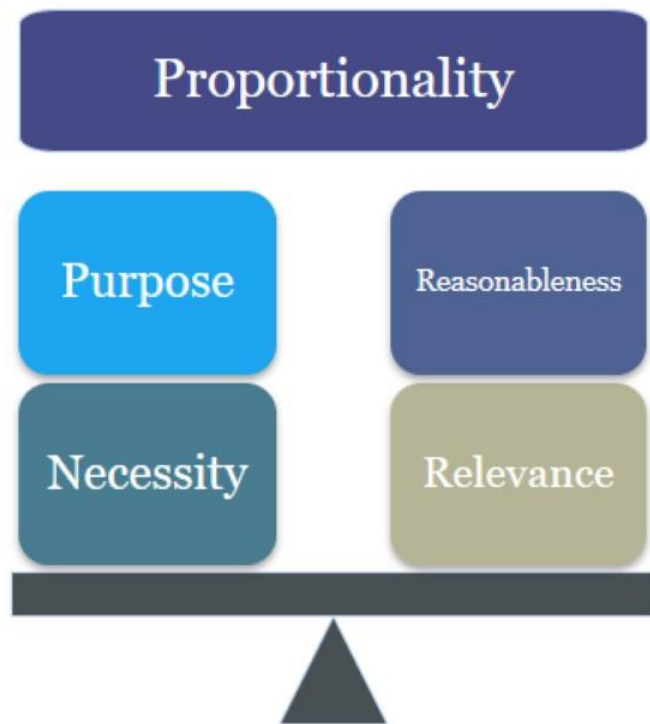
## Example

A police force passes the details of an individual who has been the victim of violent crime to an organisation which provides support to victims of crime. This personal data 'relates to' a criminal offence but is not processing for law enforcement purposes. It therefore falls under Article 10 of the UK GDPR.



# Criminal record checks

# Do you need to run criminal record checks?



## Balancing exercise

- Corporate risk
- Employee privacy

## Why?

- Determining appropriate checks
- How to use results

## Data protection rights

- Right to access
- Right to rectification
- Right to dispute
- Automated decision-making



# Criminal record checks

## *Methods of checking criminal records*

### **Two ways of seeking information about a person's criminal history**

#### 1. Voluntary disclosure

- Straightforward and cost-effective
- Risks:
  - Accuracy
  - Dishonesty
  - Scope of data sought and/or obtained (risk of revealing spent convictions)
  - Shouldn't be relied on in any event for certain roles

#### 2. Disclosure certificates: Disclosure and Barring Service (DBS):

- Formal route for requesting criminal record information contained on the police national computer

**Enforced Subject Access: criminal offence under DPA 2018**

# Criminal record checks

## *Rehabilitation of Offenders Act 1974*

- Introduced to protect individuals convicted of minor, one-time offences from future discrimination
- ROA enables certain convictions to become 'spent' after a determined rehabilitation period. These periods differ between the regions (E+W, S, NI)
- Basic disclosures will only reveal **unspent** criminal convictions.
- Certain roles, professions and industries are exempt from the ROA by virtue of the ROA (*Exceptions*) Order 1975, as amended.
- Spent convictions are still reportable. Therefore standard and enhanced disclosures will reveal both **spent** and **unspent** criminal convictions.
- **Custodial sentences greater than 4 years are never spent. Repeat convictions – even if ordinarily spent once the rehabilitation period has been reached – will also never be spent.**

# Spent or unspent?

## Rehabilitation periods

England and Wales	
Prison sentence > 48 months	Never spent
Prison sentence 30 – 48 months	7 years from end of sentence
Prison sentence 6 – 30 months	4 years from end of sentence
Prison sentence < 6 months	2 years from end of sentence
Community order	12 months
Fine	1 year

Scotland	
Prison sentence > 30 months	Never spent
Prison sentence 6 – 30 months	10 years
Prison sentence < 6 months	7 years
Community sentence	5 years
Fine	5 years

Northern Ireland	
Prison sentence > 30 months	Never spent
Prison sentence 6 – 30 months	10 years
Prison sentence < 6 months	7 years
Community sentence	5 years
Fine	5 years

*N.B. Convictions committed when an individual was under 18 have shorter retention periods (usually half)*

# Criminal record checks

## Overview

- Criminal record checks are available to employers in the United Kingdom. These are known as '**disclosures**'.
- There are three types of disclosure:
  1. Basic
  2. Standard
  3. Enhanced
- There are three authorities responsible for providing disclosures:
  - **Disclosure and Barring Service (E+W)**
  - **Disclosure Scotland (S)**
  - **AccessNI (NI)**



# The Disclosure and Barring Service

**Helen Chandler**

Head of Partnership and Engagement

# The Role of the DBS

**DBS is responsible for the delivery of disclosure and barring functions on behalf of Government.**

- We operate disclosure functions for England, Wales and the Islands under Part 5 of the Police Act 1997 supported by the following:
  - Rehabilitation of Offenders (Exceptions Order) Act 1975
  - Safeguarding Vulnerable Groups Act 2006
  - Protection of Freedoms Act 2012
- We also operate barring functions for England, Wales and Northern Ireland under the following:
  - Safeguarding Vulnerable Groups Act 2006
  - Safeguarding Vulnerable Groups (Northern Ireland) Order 2007
  - Protection of Freedoms Act 2012

# Introduction

## Our Purpose

Protecting the public by helping employers make safer recruitment decisions and by Barring individuals who pose a risk to vulnerable groups from working in certain roles.

## Our vision

### Making Recruitment Safer

By being a visible, trusted and influential organisation, providing an outstanding quality of service to all our customers and partners. Where our people understand the important safeguarding contributions they make and feel proud to work here.



# Levels of check

*A range of products to suit your needs*

Information	Type of Disclosure			
	Basic	Standard	Enhanced	Enhanced (with barred list check)
Unspent convictions	✓	✓	✓	✓
Conditional cautions	✓	✓	✓	✓
Spent convictions	✗	✓	✓	✓
Cautions, reprimands and warnings	✗	✓	✓	✓
Relevant police intelligence	✗	✗	✓	✓
Children and/or adults barred list	✗	✗	✗	✓



# DBS Filtering rules

## Convictions

- A conviction will be filtered from a criminal record certificate only if:
  - 11 years have elapsed since the date of conviction (5½ years if under 18 when convicted);
  - it did not result in a custodial (or suspended) sentence;
  - It is not on the DBS list of specified offences that will never be filtered.

## Cautions, reprimands or final warnings

- A caution for adults will be filtered after 6 years have elapsed since the date of the caution – and only if it does not appear DBS list of specified offences that will never be filtered.

# Eligibility requirements

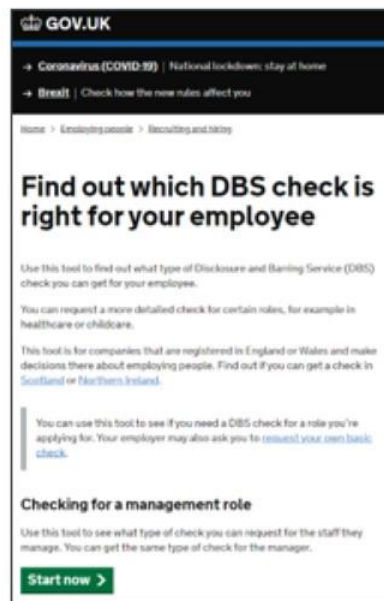
*Deciding what level of check you are able to request*

## Understand

- **Who** your organisation provides services for?
  - Children
  - Adults
  - Both
- **What** the role involves
- **How** often it is performed
- **When** you need to consider if it is supervised work
- **Where** the role is performed

There are some different rules for roles in Wales

## Eligibility calculator



The screenshot shows the GOV.UK website interface for the DBS eligibility calculator. At the top, there are navigation links for 'Coronavirus (COVID-19)' and 'Brexit'. The main heading is 'Find out which DBS check is right for your employee'. Below this, there is explanatory text about the tool's purpose and a 'Start now' button.

GOV.UK

→ Coronavirus (COVID-19) | National lockdown, stay at home

→ Brexit | Check how the new rules affect you

Home > Employing people > Security and safety

### Find out which DBS check is right for your employee

Use this tool to find out what type of Disclosure and Barring Service (DBS) check you can get for your employee.

You can request a more detailed check for certain roles, for example in healthcare or childcare.

This tool is for companies that are registered in England or Wales and make decisions there about employing people. Find out if you can get a check in [Scotland](#) or [Northern Ireland](#).

You can use this tool to see if you need a DBS check for a role you're applying for. Your employer may also ask you to [request your own basic check](#).

#### Checking for a management role

Use this tool to see what type of check you can request for the staff they manage. You can get the same type of check for the manager.

[Start now >](#)

# The Update Service

## *Supporting your safeguarding measures*

Organisations and employers can check online, free of charge with the individual's consent – the certificate must be at a level that you are able to check and for the correct workforce

### **Those making the check will be advised:**

- No new information exists
- If the original certificate contained 'no relevant information'
- New information exists
- There is no record of the certificate in the service

### **Benefits:**

- Re-check when you need to with the individual's consent
- Cheaper than a 3 yearly re-check
- Faster results – you will know instantly if there is no change or if you need to get a new certificate

# Responding to disclosure information

*Regulated activity: are they barred from the workforce?*

Legal or regulatory requirements

Age at time offence committed

Seriousness of offence

Any pattern of offending behaviour

Circumstances surrounding offending behaviour

Evidence of rehabilitation

# Types of Barring Referral

Type of Referral	Discretionary	Autobar	Disclosure Information
Source of referral	<ul style="list-style-type: none"><li>• Employers</li><li>• Agencies</li><li>• Keepers of Registers</li><li>• Supervisory Authorities</li></ul>	<p>Specified convictions &amp; cautions from PNC</p> <ul style="list-style-type: none"><li>• Autobars <b>without</b> representation</li><li>• Autobars <b>with</b> representation</li></ul>	<p>Enhanced Disclosures with a barred list check that include convictions, cautions or police intelligence</p>
Representations	YES, in all cases	YES, but only where allowed – set out in law	YES, in all cases
Request review	Under 18 – one year; 18 – 24 – five years; 25+ - ten years; a material change		
Appeal	Appeals may be made to the Upper Tribunal on a point of law or error in facts		

# Regulated activity with children

Regulated activity	Once	More than 3 days in a 30-day period	Once overnight with opportunity for contact between 2am-6am
Providing health care	✓	✓	✓
Providing personal care	✓	✓	✓
Teaching, training and instruction - unsupervised	✗	✓	✓
Caring for or supervising - unsupervised	✗	✓	✓
Providing advice or guidance on physical, emotional or educational well being	✗	✓	✓
Driving children under arrangement	✗	✓	✗
Moderating an online chat room	✗	✓	✗
Registering to be a childminder (including voluntary reg)	Not applicable		
Registering to be come a foster carer	Not applicable		
Day to day managers of staff in regulated activity			

# Regulated activity with adults

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## If done once the following activities are regulated activity with adults

### Providing health care

By or under the supervision of a healthcare professional

### Providing personal care

Washing and dressing, eating, drinking and toileting

### Social Work

Provided by a social care worker to an adult who is a client or potential client

### Assistance with the day-to-day financial running of the adult's own household

Managing cash, bills or shopping

### Assistance with the conduct of an adult's affairs

Power of attorney, deputies appointed under Mental Health Orders

### Conveying an adult

Must be for health, personal or social care due to age, illness or disability

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# You have a duty to refer if you are...

## **A Regulated Activity Provider**

Employers or voluntary organisations who are responsible for the management or control of regulated activity and make arrangements for people to work in regulated activity

## **A Personnel Supplier**

An employment business, employment agency or an educational institution that makes arrangements with a person with a view to supplying that person to employers to undertake regulated activity



# When must you refer?

*When two main conditions have been met*

## **One**

You withdraw permission to engage in regulated activity

- Dismissed
- Redeployed
- Retired
- Redundant
- Resigned

## **Two**

You think the person has either:

- Engaged in relevant conduct
- Satisfied the harm test; or
- Received a caution for, or a conviction for or been convicted for a relevant offence

# Impact of being barred from regulated activity

- **Children's Barred List** – not allowed to engage in regulated activity with children in England, Wales and Northern Ireland.
- **Adults' Barred List** – not allowed to engage in regulated activity with vulnerable adults in England, Wales and Northern Ireland.
- It is a criminal offence to work, seek work or offer to work in regulated activity when barred on the relevant list.
- It is a criminal offence for a person to permit an individual they know (or have reason to believe) is barred from regulated activity to engage in regulated activity.



**Maximum penalty 5 years imprisonment and or a fine**



The bar also applies to regulated work in Scotland

# Data protection law considerations

# Data protection law considerations

Data flows

Lawful basis

3<sup>rd</sup> party  
contracts

Data  
retention

Security

Transparency

DPO

DPIA

Rights

Breach  
response

## Lawful basis

*6 grounds for processing personal data*

Consent

Contract

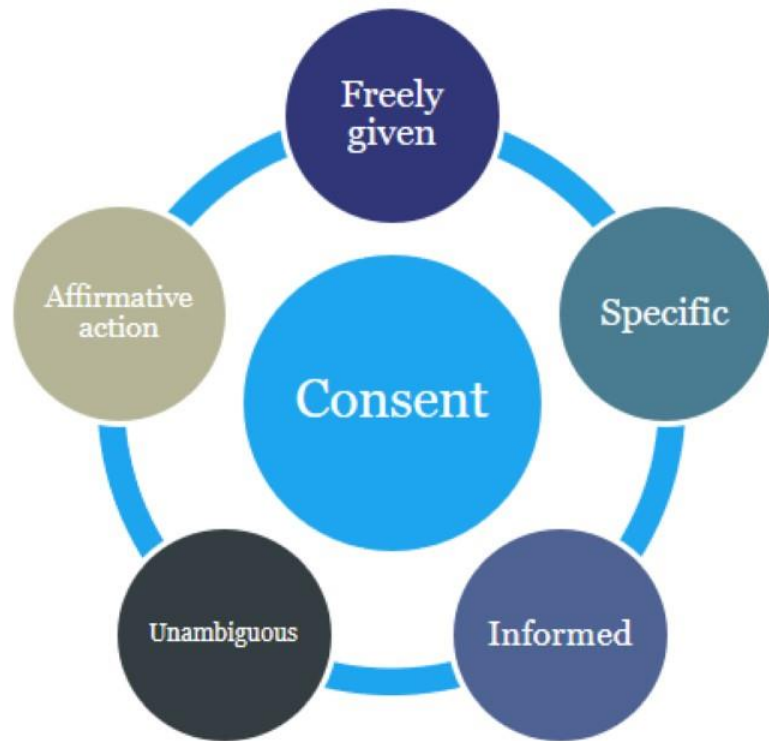
Legal  
obligation

Vital  
interests

Public task

Legitimate  
interest

# What is consent?



## Practical considerations

- Demonstrable
- Distinct from other matters
- Not freely given if cannot refuse or withdraw without detriment

# Problems with consent in employment

## General rule

"As a general rule...you should consider first whether you could give individuals a choice and only process criminal offence data with their consent. However, there will often be a good reason why you should not give individuals an upfront choice."

- Prejudicing investigations
- Tipping off

## Consent is unlikely to be valid

- Freely given = **genuine choice**
  - a different lawful basis if consent were refused or withdrawn;
  - 'consent' as a precondition of accessing your services; or
  - you are in a **position of power** over the individual: **employer-employee**

# Article 10 UK GDPR

*Processing must be authorised by law*





# Schedule 1 conditions

*28 conditions available*

## **Only a few relevant to criminal record checks in employment**

1. Employment, social security, and social protection
6. Statutory and government purposes (e.g. DBS)
10. Preventing or detecting unlawful acts
11. Protecting the public against dishonesty
12. Regulatory requirements relating to unlawful acts and dishonesty (i.e. 'fit and proper')
18. Safeguarding of children and individuals at risk
27. Anti-doping in sport
28. Standards of behaviour in sport
29. Consent (!)
32. Manifestly made public by the data subject

# Expectations of the ICO

1. Be clear about why you need criminal offence data
2. Justify why you cannot give individuals a choice (i.e. consent)
  - Not needed for all conditions
  - Problems of consent in employment
3. Determine the most suitable condition and if you meet its requirements

Schedule 1 Condition	Justify why no consent	Appropriate policy document
1. Employment, social security and social protection	N	Y
2. Health or social care purposes	N	N
3. Public health	N	N
4. Research	N	N
6. Statutory and government purposes	N	Y
7. Administration of justice and parliamentary purposes	N	Y
10. Preventing or detecting unlawful acts	Y	Y/N*
11. Protecting the public	Y	Y
12. Regulatory requirements	Y	Y
13. Journalism, academia, art and literature	N	N
14. Preventing fraud	N	Y
15. Suspicion of terrorist financing or money laundering	N	Y
17. Counselling	Y	Y
18. Safeguarding of children and individuals at risk	Y	Y
23. Elected representatives responding to requests	Y	Y
24. Disclosure to elected representatives	Y	Y
25. Informing elected representatives about prisoners	N	Y
25. Publication of legal judgments	N	Y
27. Anti-doping in sport	N	Y/N*
28. Standards of behaviour in sport	Y	Y
29. Consent	N/A	N
30. Vital interests	N	N
31. Processing for not-for-profit bodies	N	N
32. Manifestly made public by the data subject	N	N
33. Legal claims	N	N
34. Judicial acts	N	N
35. Administration of accounts used in commission of indecency offences involving children	N	Y
37. Insurance	Y	Y

\* you do not need an appropriate policy document to disclose data to the relevant authorities (or prepare to disclose it). However, you still need an appropriate policy document for other processing activities.

# Accountability

## Mechanisms

- Privacy notices
- Record of processing
- DPIAs
- Background screening policy
  - Role-based screening and case-by-case justification
  - Legitimate interest assessment (LIA)
- Appropriate policy document



# Privacy notices

*It's all about transparency!*

## Who?

- Identity and contact details of the controller (and representatives)
- Contact details of the DPO (if applicable)
- Recipients (or categories of recipients)

## Why?

- Purpose(s) of the processing
- Legal basis for processing

## What?

- Categories of personal data
- Source of the data
- What is mandatory and the consequences of not providing data

## How?

- Cross-border data transfers and how such transfers are safeguarded

## When?

- Retention period (or the criteria for determining retention)
- Timing of notice

## Other

- Data protection rights
  - Including the right to withdraw consent
- Right to lodge a complaint
- Automated decision making

# Accountability

## Record of processing



Data Protection Act  
2018

### Records of processing

Controller				
Name and contact details		Data Protection Officer (if applicable)		Repre
Name	Example controller	Name	Example DPO	Name
Address	Street, city, postcode	Address	Street, city, postcode	Address
Email	Email address	Email	Email address	Email
Telephone	Tel. number	Telephone	Tel. number	Telephone

Business function	Purpose of processing	Name and contact details of joint controller (if applicable)	Categories of individuals	Categories of personal data
Human Resources	Recruitment	N/A	Successful candidates	Employment history
Human Resources	Recruitment	N/A	Successful candidates	Criminal record check
Human Resources	Recruitment	N/A	Successful candidates	Right to work

# Accountability

## Data protection impact assessment

Bird & Bird

### DATA PROTECTION IMPACT ASSESSMENT

#### 1 Project Details

**Project name**  
Background screening

**Project manager**

<b>Name</b> Screening manager	<b>Title</b> HR Projects Manager
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<b>Email address</b> <a href="mailto:Screening_Manager@company.com">Screening_Manager@company.com</a>	<b>Department</b> Human Resources
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**Project description**  
*Please provide a description of the project.*  
Company will engage a background screening provider to assist it in carrying out background checks on its members, employees, workers, and other individuals identified in Company's Background Screening Policy.

**Project objectives**  
*What are the project's objectives?*  
The background screening project aims to mitigate against risks presented by current and prospective members, employees and other workers who will be engaged by Company in the provision of legal and

### Do I need to carry out a DPIA?

The GDPR says that a DPIA is necessary where a type of processing is **likely to result in a high risk** to the rights and freedoms of individuals.

### Is background screening 'high risk'?

- ✓ Evaluation or scoring
- ✓ Sensitive data or data of a highly personal nature
- ✓ Vulnerable data subjects (i.e. employees)
- ✓ Denial of employment/engagement

# Accountability

## *Appropriate policy document*

### **Document**

- Explains how you comply with the UK GDPR's data protection principles when handling criminal record data
- Explains how criminal offence data complies with the employer's retention and erasure policies

### **Examples**

- Background screening policy
- Data protection policy
- Employee handbook

# Employment law considerations



# Timing

- Timing of provision of privacy notice (see [Transparency](#))
- Timing of a background check is crucial
- *"Only carry out pre-employment vetting on an applicant **as at late a stage as is practicable in the recruitment process.**" (ICO, Employment Practices Code)*
- Background checks should generally be carried out **only once an offer is made**, provided that offer is stated to be **contingent** on a successful check
- This approach is advisable (and indeed required in some cases) under UK law, but not always possible based on local employment rules

# Risks to consider

- Obligations under the Rehabilitation of Offenders' Act 1974 (ROA 1974)
- Unfair dismissal / constructive dismissal
- Discrimination
- Whistleblowing
- Processing risks
- Data subject access requests and the right of erasure
- Enforced subject access

# When and how to introduce background screening

- **Who and what**

- which role(s)?
- purpose of check(s)
- minimum needed

- **Timing**

- implementing procedures
- compliance requirements
- buy in
- wider context – business, regulatory etc.

- **Communications**

- tone and audience
- explain

- **Support and information**

- policies and procedures
- Training

- **Preparation**

- difficult queries
- refusals

## **Phases:**

1. *Preparing, coordinating and consulting:* identify objectives / aims, determine parameters, identify stakeholders, identify risks and obstacles, consider timings
2. *Training:* Ensure key individuals receive training on regulatory requirements, systems, handling trick questions etc.
3. *Review and testing:* Test the system and those involved
4. *Communications and implementation:* Plan your comms and roll-out

# Introducing background checks for applicants

- Ensure you have appropriate policies in place
- Timing and scope of checks
- Consider your sources
- Consider any commercial obligations to clients or other third parties\*
- Consider whether to make offers conditional on satisfactory checks results

# Introducing background checks for current staff

- Communications and messaging for current employees are key
  - emails / letters and FAQ sheets
  - meetings, discussions etc.
- Ensure you have appropriate policies in place
- Consider:
  - timing
  - scope of checks
  - sources
- Consider any commercial obligations to clients or other third parties\*
- Generally much higher risk
  - balance of bargaining power
  - concern about consequences
  - refusals
  - commercial risk

# Tricky scenarios

## **What if an existing employee refuses?**

- Communication and engagement
  - do not force or threaten – seek to persuade
  - explain potential consequences
- Consider the implications and level of risk in not conducting the check
  - consider whether there are any alternatives (other roles / locations)?
- Consider the implications and risk in dismissing the employee
  - whistleblowing

## **What if the employer discovers that an existing employee has a criminal conviction?**

- Was the information obtained lawfully or unlawfully?
- Are you entitled to know about the criminal conviction (is it spent or unspent)?
- Consider the risks
  - unfair dismissal
  - constructive dismissal
  - whistleblowing
  - reputational risk

# Extras

# Disclosure and Barring Service

## *Useful links*

- [DBS Guidance Leaflets](#)
- [DBS Check process explained - video](#)
- [DBS eligibility guidance](#)
- [Eligibility guidance for enhanced DBS checks](#)
- [DBS Barring Referral Guidance](#)
- [DBS Barring Referral Form and Guidance](#)
- [How to make a Good Quality Barring Referral](#)



# Disclosure and Barring Service

## *How to contact us*

### **Partnership and Engagement Team**

- [DBSEngagement@dbs.gov.uk](mailto:DBSEngagement@dbs.gov.uk)

### **Regional Outreach**

- [DBSRegionaloutreach@dbs.gov.uk](mailto:DBSRegionaloutreach@dbs.gov.uk)

**Website:** [www.gov.uk/dbs](http://www.gov.uk/dbs)

**Twitter:** @DBSgovuk

### **Further information – Barring:**

- **Helpline:** 03000 200 190
- **Email:** [dbsdispatch@dbs.gov.uk](mailto:dbsdispatch@dbs.gov.uk)

### **Further information – Disclosure:**

- **Customer Services:** 03000 200 190
- **Email:** [customerservices@dbs.gov.uk](mailto:customerservices@dbs.gov.uk)