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# SEEKING A SELF-DECLARATION FROM APPLICANTS

## GUIDANCE FOR EMPLOYERS

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### Introduction

Model declaration forms A and B outline a range of questions that employing organisations are legally permitted to ask as part of their recruitment process. They have been specifically designed to ensure a fair and consistent approach is taken when assessing an applicant's suitability for NHS roles within England, including information about criminal record history, registration with professional bodies and fitness to practise, where relevant to the role. They also pose questions about conduct or behaviour in circumstances that may be relevant to consider in a work relating setting.

Requiring applicants to complete a self-declaration can be useful to help them gain a better understanding about the checks you will be undertaking as part of the recruitment process and the type of information that may be considered about them. It may also provide useful information to consider as part of your overall assessment of an applicant's suitability for the role you are recruiting to.

If any information declared should be an issue for further consideration or concern, it also allows you to have an open conversation with the applicant at the earliest appropriate opportunity. Any such discussion should be aimed at understanding the context and circumstances surrounding any information the applicant may have disclosed. Our [discussion guide](#) can help you to follow best practice where an applicant declares a previous conviction. Where regarded as necessary and helpful to reaffirm the recruitment decision, you should offer the applicant opportunity to present any additional evidence they may wish you to take into account in support of their application.

Seeking a self-declaration from applicants should be complementary to good recruitment practice. It does not substitute the need to carry out the range of pre-appointment checks that are required by law or are available to employers. The full range of checks that NHS organisations in England must undertake as part of their recruitment process are outlined in the [NHS Employment Check Standards](#).

## Importance of using the right form

Questions 1-4 in each of the forms relate to information about a person's criminal record history. These are worded differently because legislation under the DBS regime defines what you can ask and consider, depending on the type of role you are recruiting to and its eligibility for different levels of DBS check. Asking applicants to complete the correct form will therefore be essential to ensure you only seek and consider information you are legally permitted to consider.

1. **Model declaration form A** - should only be completed by applicants applying for NHS positions which are excluded from the provisions set in the Rehabilitation of Offenders Act 1974 (known as an **Exempt** position).

Exempt positions are eligible for a **standard or enhanced DBS check** under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in England and Wales) or the Police Act 1997.

If recruiting to a position eligible for a standard or enhanced DBS check, employers are entitled to ask applicants about all criminal convictions and cautions that are not protected (i.e. eligible for filtering) under the Exceptions Order (as amended).

In January 2019, the Supreme Court made a ruling which has led to amendments to the Exceptions Order of the Rehabilitation of Offenders Act in regard to what criminal record information is now protected and under what circumstances. These amendments are set out in the [Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(Amendment\) \(England and Wales\) Order 2020](#) and the [Police Act 1997 \(Criminal Record Certificates: Relevant Matters\) \(Amendment\) \(England and Wales\) Order 2020](#), and in the new guidance from the [Ministry of Justice](#). This guidance is in effect from 28 November 2020.

Under the new rules, there is no longer a requirement for the automatic disclosure, either by individuals or the DBS of youth cautions, reprimands and final warnings. In addition, the "multiple conviction" rule has been removed, which required the mandatory disclosure of all convictions if there was more than one on record for a person.

More information about protected convictions and cautions can be found in the criminal record check standard on the [NHS Employers website](#).

2. **Model declaration form B** - should be used to seek a self-declaration from applicants applying for any NHS position that is identified as being covered by the Rehabilitation of Offenders Act 1974 (known as a **non-exempt position**) and therefore a basic disclosure may be considered. Any decision to verify information by obtaining a basic disclosure is discretionary and must be proportionate to risk.

For such roles, employers must only ask for and consider information about unspent criminal convictions and conditional cautions.

Employers should refer to the [criminal record check standard](#) and [online DBS eligibility tool](#) on the NHS Employers website, to determine whether the role is eligible for a basic, standard or enhanced DBS check.

[Model declaration forms A and B](#) can also be downloaded from the NHS Employers website.

## When to seek a self-declaration

Employers should ensure that processes do not unnecessarily prevent or restrict individuals who may have made past mistakes but who are perfectly safe and meet all the relevant criteria for the role being advertised.

Under normal circumstances, employers should only require shortlisted applicants to complete a self-declaration using model declaration form A or B. Any requirement for individuals to complete one of these forms earlier in the recruitment process should be limited to where there is a safeguarding need. For example, where it is considered essential to recruit quickly in order to maintain safe levels of service or patient care. It will be important for you to make any such requirements clear to individuals when they first apply for the role.

In all cases, information obtained using model declaration forms A or B must be processed in line with the Data Protection Act 2018 and the General Data Protection Regulation 2018 (GDPR). Further information about compliance with the Data Protection Act and GDPR can be found on the [Information Commissioner Office's website](#).

## Internal recruitment

Under normal circumstances, there are no requirements for employers to ask existing members of staff or volunteers to complete a new declaration where they are changing roles and the new position is the same or similar to their current role. Any ongoing assessment of an individual's continued suitability should be based on what information has already been gained about them while working or volunteering within the organisation.

In such circumstances you may, in addition, wish to remind directly paid staff of their ongoing contractual duty to alert you to any changes to their registration with a professional body, fitness to practise and criminal record history and ask them to sign a short statement confirming that their circumstances have not changed since they were first appointed.

## Providing information for applicants

Changes that came into force under the Data Protection Act 2018 and the General Data Protection Regulation 2018, placed an even greater duty on employers to be transparent about how they process information about individuals. Recruitment packs should outline the type of checks that will be undertaken, the lawful basis for collecting information, and how it will be processed.

Providing a statement which outlines your local policy on recruiting individuals that have a criminal record history may also be helpful to reinforce your organisation's commitment to treating all applicants equally and fairly based on their skills, experience and ability to carry out the role being advertised. The only exception to where applicants may be treated differently is where there is a legal reason, such as DBS barring, which would prevent them from working in a regulated activity. Declaring any exceptions which would prevent certain individuals from applying for roles will be helpful to ensure they are not asked to go through a recruitment process unnecessarily.

Information in recruitment packs should also include links to where applicants may seek further advice to help them declare the right type and level of information and fully understand their rights when doing so. This may include signposting to a relevant union and/or professional regulatory or licensing body (where applicable), the Citizen's Advice Bureau and other charities, such as Nacro and Unlock, who specialise in providing advice and support to individuals who have a criminal record.

## **Where criminal offences have been declared**

The suitability of an applicant with a criminal record may vary, depending on the nature of the job, the type of duties that role will involve and the relevance, nature and circumstances of the offence in question.

Any potential risks that may be identified during the recruitment and checking process will need to be handled sensitively and carefully assessed on a case-by-case basis.

## **Discrepancies in information provided**

The criminal justice system and criminal records disclosure regime can be complex and difficult to understand. Many applicants are confused about what their criminal record is and what they are required to disclose for employment purposes, so can genuinely make the mistake of incorrectly disclosing information or omitting relevant information. Employers should not automatically assume that an error in disclosure is intended to deceive. Discussions about discrepancies between information provided by the applicant and that declared as part of a DBS check, should be approached sensitively. Wherever possible, we recommend this includes a face to face meeting with the applicant, giving them opportunity to explain.

Where serious misdirection is evident, employers may reconsider their appointment offer and/or take any necessary formal action against the individual if already employed or volunteering within the organisation.

If the applicant has tried to apply for/or is engaged in a regulated activity in which they are barred from working or volunteering, employers should consider whether they need to notify any relevant professional regulatory or licencing body, as well as making a referral to the Disclosure and Barring Service (DBS).

Further information about the employer's duty to make a referral to the DBS can be found on the [NHS Employers website](#).

## **Military and ex-military personnel**

Some criminal convictions and cautions that apply under military service law may not be considered as such under civilian law. Employers will therefore need to ensure that they treat information that may be declared in a self-disclosure by military or ex-military personnel in an appropriate and proportionate manner. Further guidance about handling and considering military offences can be found in the [criminal record check standard](#).

## Retaining information

You should not retain information obtained in the model declaration forms or any other supplementary evidence the applicant may have provided, any longer than strictly necessary. If you decide not to recruit the applicant, we recommend that information should be retained for a minimum of six months to allow for considerations and resolution of any disputes or complaints. If you appoint the individual, then it may be necessary for you to retain information for a longer period in order to meet any safeguarding or auditing requirements.

Having a local policy on the correct handling of sensitive personal data will be important to ensure the safe processing of information, in compliance with data protection, human rights and other employment law.

Information must be kept securely and separately from any personnel records with access strictly limited to those who are entitled to see it as part of their duties. Once the retention period has elapsed, any such information should be destroyed by secure means, for example by shredding, pulping or burning. While awaiting destruction, the secure handling of information, as outlined above, should continue to be followed.

Before destroying information, you should retain a record of the date of when the self-declaration was requested/received and the position for which it was obtained for. To ensure transparency and in case of any challenge about the recruitment process, it will also be useful to keep an accurate log of information discussed with the applicant and the rationale for your decision.

## Legislation to consider

When requiring applicants to complete a self-declaration form, it is important that you are mindful of different pieces of legislation that affect the type of criminal record information you can obtain and act on, as part of your recruitment process. This includes:

- [Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975](#). There have been a number of significant changes to the Exceptions Order over time which have had an impact on what offences can legally be considered as part of any recruitment process. It is essential that all recruitment and recruiting managers familiarise themselves with DBS and other relevant guidance to ensure they remain compliant with the law and only consider information they are legally entitled to.
- [The Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(Amendment\) \(England and Wales\) Order 2013](#) introduced the DBS filtering rules. The amendment enables certain spent or minor convictions and cautions to become protected (i.e. eligible for filtering) when specific conditions are met. Protected convictions and cautions are no longer disclosed in a standard or enhanced disclosure certificate and must not be considered as part of any recruitment decision.
- [Police Act 1997 \(Criminal Record Certificates: Relevant Matters\) \(Amendment\) \(England and Wales\) Order 2013](#) (S.I. 2013/1198) which amends the definition of 'relevant matters' in the Police Act 1997. This amendment, which came into effect from 29 May 2013, requires police forces to use a much more stringent assessment when considering whether non-conviction

information is relevant to the position being recruited to and therefore should be included in a standard or enhanced disclosure certificate. Any decision to include non-conviction information is based on any potential risks identified to protect the vulnerable and/or where additional background information may prove invaluable to a prospective employer.

- [Legal Aid and Sentencing and Punishment of Offenders Act 2012](#) - Section 139 of the Legal Aid and Sentencing and Punishment of Offenders Act 2012 (LASPO) made changes to the rehabilitation periods outlined in the Rehabilitation of Offenders Act 1974 which impacted on when a conviction or caution becomes spent and can be disregarded. Understanding when convictions and cautions become spent will be critical when considering recruiting to positions where a basic disclosure only can be considered.

A further amendment in April 2013 introduced youth cautions and youth conditional cautions to replace reprimands and warnings. This refers to where a young person commits their first or second minor offence and has not been to court before. In such cases the police may consider issuing a Youth Restorative Disposal, a Police youth caution or youth conditional caution in place of requiring them to appear in court. Employers should check that any recruitment paperwork or practices do not refer to or ask for reprimands or warnings.

- [Rehabilitation of Offenders Act 1974 \(Exceptions\) Order 1975 \(Amendment\) \(England and Wales\) Order 2020](#) and the [Police Act 1997 \(Criminal Record Certificates: Relevant Matters\) \(Amendment\) \(England and Wales\) Order 2020](#).

These statutory instruments which amended the Exceptions Order and the Police Act came into force in November 2020. They reflected the [Supreme Court judgment made in January 2019](#). The Supreme Court ruled that two aspects of the criminal records disclosure regime would contravene a person's human rights. In particular, the blanket rules which require the automatic disclosure of youth cautions, reprimands and warnings, and of multiple convictions. More information about protected convictions and cautions can be found in the [criminal record check standard](#) on the NHS Employers website.

The various pieces of legislation which underpins employment check requirements including those under the DBS regime, are periodically subject to change, we therefore strongly recommend that you regularly review your local recruitment policies and processes to ensure they remain fully compliant with current legislation, including the Data Protection Act 2018 and the General Data Protection Regulation 2018). This includes the handling, storage, retention and sharing of any information that might be disclosed by an applicant as part of their application or when providing a self-declaration using model declarations form A or B.

## Useful links

- [Model declaration forms A and B](#) – standardised templates to obtain a self-disclosure from applicants applying for roles in the NHS (**NHS Employers website**)
- [NHS Employment Check Standards](#) – outlines the check requirements that must be undertaken when considering NHS positions in England (**NHS Employers website**)
- [Recruiting people who have criminal offences](#) – promotes positive work being undertaken by NHS organisations in partnership with prison services, community groups and charity bodies

to support those who have a criminal record to get back into work. Includes myth-busting, key considerations, and case studies (**NHS Employers website**)

- The following websites provide practical guidance for employers and individuals on the DBS filtering rules. They also outline which offences are protected (i.e. are eligible for filtering) and therefore will never be disclosed in a DBS check and must not be considered as part of the recruitment process:

- [Nacro website.](#)

- [Unlock website.](#)

- [DBS website.](#)