

Criminal record checks

The new Disclosure and Barring Service has now become operational. Introduced in an attempt to scale back the number of criminal record checks under the previous CRB system, it is clear that there are still some issues to do with the right to privacy to be resolved.

Over the last year, a number of legislative and structural changes have been implemented in respect of criminal record checks. Combined with the effects of recent case-law, these changes will be of great interest to employers and employees working with vulnerable members of society.

The Disclosure and Barring Service

On 1 December 2012, the Disclosure and Barring Service (DBS) became operational, amalgamating the functions of its predecessors the Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) for England. The DBS is responsible for processing requests for criminal record checks, deciding whether it is appropriate for a person to be placed on or removed from a barred list and maintaining the DBS children's barred list and the DBS adults' barred list for England, Wales and Northern Ireland.

Part 5 of the Protection of Freedoms Act 2012 enacted a number of important changes from the existing system. The definitions of regulated activity for both adults and children have been altered such that fewer activities are now regulated. It is anticipated that this will reduce the number of positions requiring barring checks from 9.3 million to around 5 million. An independent right of review will now be available, allowing individuals to challenge information disclosed about them before it is given to their employer. Further, there are plans that DBS check certificates will be sent to individuals rather than organisations. A 'portable' DBS check certificate has been proposed, which will enable an individual to register once, and for future employers to check whether that individual's certificate is up-to-date through an online updating service. This service will be free for volunteers.

These changes form part of Home Secretary Theresa May's call in 2010 for criminal record checks to be 'scaled back to common-sense levels'. However, the onus will now be on employers to determine which roles require criminal record checks. Further, criminal record identity checking guidelines have been introduced (in May 2012, but apply to DBS checks) that are intended to make it tougher for those with a criminal record to hide past convictions by changing their identity. A number of documents previously accepted for identity verification (such as the National Insurance Card) may no longer be used. This may make it harder for employees or volunteers requiring criminal record checks to obtain them.

Case law

The provisions of the Protection of Freedoms Act and the introduction of the DBS, however, do not alter the fact that certain legislation requiring criminal record checks has been declared incompatible with the right to privacy under Article 8 of the European Convention on Human Rights (ECHR). In *R (on the application of T) v Chief Constable of Greater Manchester and others* [2013] EWCA Civ 25 the Court of Appeal considered the case of *T*. When applying for a part time job and subsequently a sports course aged 18, an enhanced criminal record certificate (ECRC) revealed two police warnings he had received in connection with two stolen bicycles when he was 11.

Article 8 was engaged because cautions constitute personal information (unlike convictions, which may be considered public when fresh), and are liable to affect an individual's ability to gain employment and form relationships with others. Despite the legitimate aim of protecting the vulner-

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able and assisting employers to assess a candidate's suitability for a role, the blanket requirement to disclose all convictions and cautions relating to recordable offences was held to be disproportionate. The Secretaries of State for the Home Department and Justice are seeking permission to appeal to the Supreme Court, and the declaration of incompatibility will not take effect until the outcome of that application is known.

T follows a number of recent decisions that cast doubt on the compatibility of certain criminal record checks with Article 8. In *MM v United Kingdom* [2012] ECHR 24029/12 the European Court of Human Rights took issue with the lack of proper filtering arrangements for the disclosure of cautions under s113A of the Police Act 1997. *MM* concerned an individual who had an offer of employment withdrawn after disclosing a six-year-old caution. The Court found that there were insufficient safeguards in the disclosure system to ensure the applicant's Article 8 right was not violated.

In *R (on the application of J) v the Chief Constable of Devon and Cornwall* [2012] EWHC 2996, allegations of assault against a nurse were added to her ECRC. It was held that the decision to disclose these was in breach of her Article 8 right because of their unsubstantiated nature and the failure to allow her to make representations regarding the allegations.

Conclusion

The Protections of Freedoms Act and the establishment of the DBS introduce changes that aim to strike a balance between protecting the vulnerable and facilitating employment. However, it is evident from *T* that there is still some way to go to ensure that the right to privacy is respected when conducting criminal record checks. The outcome of this appeal and the implementation of the changes to the criminal record checks system should be watched closely by both employers and employees working with the vulnerable.

Find out more

You may find our May 2012 article on changes to provisions for CRB checks useful – <http://www.bwblip.com/knowledge/2012/05/22/changes-to-crb-identity-checking/>

The gov.uk website also provides some helpful guidance-
<https://www.gov.uk/crb-criminal-records-bureau-check/overview>