



Institute of Licensing

Briefing Note on the Rehabilitation of Offenders Act 1974

A briefing note by James Button, Solicitor and Stephen Turner, Solicitor ¹

This briefing note examines the workings and impact of the Rehabilitation of Offenders Act 1974 (“ROA 1974”), as amended and its application to licensing, together with the use of the Disclosure and Barring Service (DBS). It is intended to assist licensing professionals, lawyers, councillors and applicants and licensees, but does not constitute legal advice.

The Briefing Note has been endorsed by:



Lawyers in Local Government
(LLG)



Welsh Local Government
Association (WLGA)



National Association of
Licensing and Enforcement
Officers (NALEO)

¹ This note is derived from chapter 5 of *“Button on Taxis: Licensing Law and Practice”* 4th edition By James TH Button, Bloomsbury Professional 2017, and the authors gratefully acknowledge that.

This briefing note examines the workings and impact of the Rehabilitation of Offenders Act 1974 (“ROA 1974”), as amended and its application to licensing, together with the use of the Disclosure and Barring Service (DBS). It is intended to assist licensing professionals, lawyers, councillors and applicants and licensees, but does not constitute legal advice.

Although ROA 1974 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (“Exceptions Order”) ² have been in force and in use for almost 48 years, they remain a confusing set of legislation. Both the ROA 1974 and the Exceptions Order have been amended many times: in the case of the Exceptions Order well over 50 times in the 48 years of its existence. It is therefore essential that reference is always made to the most up-to-date annotated and amended version of the legislation ³.

This confusion has been compounded by amendments to the Exceptions Order in 2013 and 2020. The 2013 amendment introduced the concept of “protected cautions” and “protected convictions”, and the rules relating to those were further amended in November 2020. These amendments are often referred to as ‘the Filtering Rules’. In addition, the Government has issued guidance which uses terms which are not found in the legislation ⁴.

The workings of the Rehabilitation of Offenders Act 1974

ROA 1974 introduced a mechanism whereby a person who had a criminal conviction could ‘lose’ their criminal record in certain circumstances. ROA 1974 uses the terms “live” and “spent” in relation to convictions. ROA 1974 was amended on 19 December 2008 to include simple cautions, reprimands and warnings and conditional cautions. The amendment applies retrospectively to include those incurred before that date.

‘Rehabilitation’ occurs in certain situations. Convictions can become spent after a period of time and once spent, for many purposes a person is quite entitled not to disclose (or to deny in the face of a direct question) that they were ever convicted of such an offence. S1(2) makes it clear that failure to pay a fine or to comply with the requirements of some other form of sentence e.g., breach of any condition or failure to comply with a suspended sentence or a supervision order does not prevent rehabilitation. Simple cautions, warnings and reprimands are spent the moment they have been issued and conditional cautions after either 3 months

² SI 1975/1023

³ Resources include commercial subscription services such as Westlaw and LEXIS-NEXIS, but updated primary legislation is also available from the National Archives at <https://www.legislation.gov.uk/>

⁴ See “Guidance on the Rehabilitation of Offenders Act 1974 and The Exceptions Order 1975” available at <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

or earlier if the caution was stated to last for a shorter period of time (see s 8A and Schedule 2).

It is of no application to Fixed Penalty Notices or Penalty Notices for Disorder as neither involve any admission of guilt. Likewise, ROA 1974 does not cover or apply to Civil Penalty Notices (e.g., for immigration matters). Where a DVLA driving licence endorsement is accompanied by a fixed penalty notice, that is a conviction and is therefore treated as such under ROA 1974.

It is important to recognise that the effects of ROA 1974 only apply to convictions, cautions, conditional cautions, reprimands and warnings, and this was emphasised in *Hussain v Waltham Forest London Borough Council*⁵ :

“As can be seen from section 1, under the Act rehabilitation is specifically related to convictions: it is a conviction which may become spent, and a person may become rehabilitated in respect of a conviction. As the tribunal panel indicated (at [28] of their judgment), the Act has no part to play where the individual has engaged in conduct amounting to a criminal offence if it does not result in a prosecution and conviction for an offence. Such conduct can never be "spent".”⁶

Questions often arise in relation to the rehabilitation periods for disqualifications from driving, points endorsed on DVLA licences, fixed penalty notices and fines.

In relation to a disqualification for driving, either as a result of the totting-up process or drink-driving, that is specified within the definition of a “relevant order” by virtue of s5(8) ROA 1974 and detailed at the end of the table in section 5(2) ROA 1974. It is therefore spent when the period of disqualification ends as a consequence of s5(3) ROA 1974.

Penalty points are endorsements on DVLA licences and are imposed as a result of a conviction. They can be accompanied by either a fine or a fixed penalty notice. Penalty points also fall within the definition of a “relevant order” as they are an “other penalty” as defined in s5(8) ROA 1974. As there is no specified end date for an endorsement, that endorsement will become spent 24 months after the date of conviction as a consequence of s5(8) ROA 1974.

⁵ [2021] 1 WLR 922 CA

⁶ Per Hickinbottom LJ at para 14. Although no reference was made to cautions by Hickinbottom LJ, they are covered by the Act and capable of rehabilitation by virtue of section 8A. It is submitted that this paragraph should be read as if references to “convictions” are references to “convictions and cautions, reprimands and warnings”.

Confusion in this area may arise as a result of the Guidance⁷. This states:

“An endorsement for a road traffic offence listed in Schedule 2 to the Road Traffic Offenders Act 1988, imposed either by the court or by means of a fixed penalty notice (FPN) is a sentence for the purposes of the 1974 Act and may become spent after 5 years (or two and half years where the offender is under 18). Road traffic legislation specifically provides for a FPN in these circumstances to be treated as a conviction and dealt with as such under the 1974 Act. Penalty points and a driving disqualification imposed by the court on conviction may become spent when they cease to have effect (penalty points have effect for three years as set out in road traffic legislation). Where the court imposes more than one sentence or penalty for the offence then the longest rehabilitation period determines when the conviction may become spent.

A fixed penalty notice (FPN) can be used to deal with minor road traffic offences, but it is not a criminal conviction or a caution and the 1974 Act does not apply.”

This does not appear to be correct, and as outlined above, the rehabilitation period for an endorsement is 24 months. It is also difficult to see why they state that endorsement either imposed by the court or by a fixed penalty notice become spent after 5 years.

It should never be overlooked that in relation to licensing matters, situations that have not resulted in a conviction can still be taken into account when considering the suitability of the applicant or licensee. This has been consistently confirmed by the High Court⁸.

Although it is often felt that rehabilitation only applies to ‘less serious’ offences, this is incorrect, as both the possibility of rehabilitation and the length of time before rehabilitation occurs depend upon the sentence imposed, not the offence committed, as stated in ROA 1974, s 1:

1.— Rehabilitated persons and spent convictions.

(1) Subject to subsections (2), (5) and (6) below, where an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say—

(a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act; and

⁷ See “Guidance on the Rehabilitation of Offenders Act 1974 and The Exceptions Order 1975” available at <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

⁸ See *R v Maidstone Crown Court ex parte Olson* [1992] COD 496 QBD; *McCool v Rushcliffe BC* [1998] 3 All ER 889 QBD; *Leeds City Council v Hussain* [2003] RTR 199 Admin Crt

(b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction in accordance with section 6 below a sentence which is excluded from rehabilitation under this Act;

then, after the end of the rehabilitation period so applicable (including, where appropriate, any extension under section 6(4) below of the period originally applicable to the first-mentioned conviction) or, where that rehabilitation period ended before the commencement of this Act, after the commencement of this Act, that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent.

There are certain sentences which, when imposed, mean that a conviction can never become spent, and these are detailed in ROA 1974, s 5(1):

“(1) The sentences excluded from rehabilitation under this Act are—

- (a) a sentence of imprisonment for life;
- (b) a sentence of imprisonment, youth custody, detention in a young offender institution or corrective training for a term exceeding forty-eight months;
- (c) a sentence of preventive detention;
- (d) a sentence of detention during Her Majesty's pleasure or for life under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000, under section 250 or 259 of the Sentencing Code or under section 209 or 218 of the Armed Forces Act 2006, or under section 205(2) or (3) of the Criminal Procedure (Scotland) Act 1995, or a sentence of detention for a term exceeding forty eight months passed under section 91 of the said Act of 2000 or section 250 or 252A of that Code or section 209 of the said Act of 2006 (young offenders convicted of grave crimes) or under section 205ZC(5) or 208 of the Criminal Procedure (Scotland) Act 1995 ;
- (e) a sentence of custody for life; and
- (f) a sentence of imprisonment for public protection under section 225 of the Criminal Justice Act 2003, a sentence of detention for public protection under section 226 of that Act or an extended sentence under section 226A, 226B, 227 or 228 of that Act or section 254, 266 or 279 of the Sentencing Code (including any sentence within this paragraph passed as a result of any of sections 219 to 222 of the Armed Forces Act 2006);”

Apart from those specified sentences, the theory is that any other conviction or caution can in due course become spent for the purposes of the Act.

The length of time that has to elapse before a conviction or caution becomes spent depends on the sentence imposed, rather than the crime committed, and these periods are detailed in the table contained in s 5(2).⁹

Table of Rehabilitation Periods – ROA 1974, s 5(2) (as amended)

<i>Sentence</i>	<i>End of rehabilitation period for adult offenders</i>	<i>End of rehabilitation period for offenders under 18 at date of conviction</i>
A custodial sentence of more than 30 months and up to, or consisting of, 48 months	The end of the period of 7 years beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 42 months beginning with the day on which the sentence (including any licence period) is completed
A custodial sentence of more than 6 months and up to, or consisting of, 30 months	The end of the period of 48 months beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 24 months beginning with the day on which the sentence (including any licence period) is completed
A custodial sentence of 6 months or less	The end of the period of 24 months beginning with the day on which the sentence (including any licence period) is completed	The end of the period of 18 months beginning with the day on which the sentence (including any licence period) is completed
Removal from Her Majesty's service	The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed	The end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed
A sentence of service detention	The end of the period of 12 months beginning with the day on which the sentence is completed	The end of the period of 6 months beginning with the day on which the sentence is completed

⁹ In March 2014 there was a significant reduction in the rehabilitation periods by virtue of s 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which amended s 5 of the ROA 1974. The revised rehabilitation periods took effect on 10 March 2014 and apply to all convictions, both before and after that date, and the rehabilitation period runs from the date of conviction in accordance with s 5(2)(a).

<i>Sentence</i>	<i>End of rehabilitation period for adult offenders</i>	<i>End of rehabilitation period for offenders under 18 at date of conviction</i>
A severe reprimand or reprimand under the Armed Forces Act 2006	The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed	The end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed
A fine	The end of the period of 12 months beginning with the date of the conviction in respect of which the sentence is imposed	The end of the period of 6 months beginning with the date of the conviction in respect of which the sentence is imposed
A compensation order	The date on which the payment is made in full	The date on which the payment is made in full
A community or youth rehabilitation order	The end of the period of 12 months beginning with the day provided for by or under the order as the last day on which the order is to have effect	The end of the period of 6 months beginning with the day provided for by or under the order as the last day on which the order is to have effect
A relevant order	The day provided for by or under the order as the last day on which the order is to have effect	The day provided for by or under the order as the last day on which the order is to have effect

The effects of re-offending

If a person commits another offence during the rehabilitation period for the first offence, then the rehabilitation period for the earlier offence is extended until the rehabilitation period for the subsequent offence has expired. ROA 1974, s 6(4) states:

‘6–(4) Subject to subsection (5) below, where during the rehabilitation period applicable to a conviction—

- (a) the person convicted is convicted of a further offence; and
- (b) no sentence excluded from rehabilitation under this Act is imposed on him in respect of the later conviction;

if the rehabilitation period applicable in accordance with this section to either of the convictions would end earlier than the period so applicable in relation to the other, the rehabilitation period which would (apart from this subsection) end the earlier shall be extended so as to end at the same time as the other rehabilitation period.’

This does not apply to disqualifications, disabilities, prohibitions or other penalties which are not covered by the Table in s 5(2)¹⁰. Whilst this clearly has important implications in relation to some subsequent offences, the effect of s6 is that some recidivists are never rehabilitated due to persistent re-offending, and their convictions will never be spent. The number of people so affected has reduced significantly as a result of the reductions in rehabilitation periods from March 2014, and the introduction of protected convictions.

Cautions

A simple caution can be administered by the police and other enforcement agencies, although only the police can issue conditional cautions. The process is covered by the Ministry of Justice Guidance '*Simple Cautions for Adult Offenders*'¹¹. In relation to the effect of a caution, the Guidance states:

'A) Significance of the admission of guilt

66. A simple caution is an admission of guilt to committing an offence and forms part of an offender's criminal record.

B) Criminal record: retention and disclosure of the simple caution

67. The simple caution forms part of an offender's criminal record and a record will be retained by the police for future use. It may also be referred to in future legal proceedings.

68. A simple caution may be revealed as part of a criminal record check. Separate guidance governs the disclosure of criminal record information.

69. All information relating to simple cautions (as well as convictions) for a recordable offence is retained on the Police National Computer ("PNC"). ACPO guidelines set out how long this information will be retained for. The information is kept for police operational reasons and in the interest of prevention and detection of crime.

70. Legislation which came into effect in December 2008 brought simple cautions within the ambit of the Rehabilitation of Offenders Act 1974 ("ROA"). This means that simple cautions become spent immediately they are administered. This means that an individual does not need to disclose a simple caution when asked unless they are seeking work in an occupation that is listed in the Exceptions Order to the ROA such as working with children and vulnerable adults or for other excepted purposes such as seeking to obtain certain licenses. Cautions will also be disclosed under Disclosure and Barring Service ("DBS") standard and enhanced checks. Further information can be obtained from the DBS.'

¹⁰ See ROA 1974, s 6(5).

¹¹ With effect from April 2015. Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416068/cautions-guidance-2015.pdf

Section 8A and Sch 2 to the ROA 1974 address the question of cautions and rehabilitation. The effect of s 8A and Sch 2 is that a simple caution is spent at the time the caution is given, whilst conditional cautions remain live for three months from the date on which the caution was given, or earlier if the caution was stated to last for a shorter period of time.

Prior to 2013, persons under the age of 18 could be given a reprimand or warning by the police in respect of criminal offences under sections 65 and 66 of the Crime and Disorder Act 1998. Those were abolished in 2013 and replaced by youth cautions under section 66 ZA of the same Act. As the guidance issued by the Home Office in November 2020 makes clear,

“a reprimand or warning given before [2013] is now to be treated as a youth caution, which as with adult cautions, is spent immediately”.¹²

Protected Convictions and Protected Cautions

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013¹³ introduced two new concepts: a 'protected caution' and a 'protected conviction'.

These provisions were further amended in November 2020 by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020. This removed the provision introduced in the 2013 reforms that a second criminal offence would prevent any conviction or caution being protected. The 2020 order also made any cautions issued to children under the age of 18 protected.¹⁴ The net result of this is that no protected cautions or convictions will appear on even an enhanced DBS certificate.

Both protected cautions and protected convictions are defined in Article 2A of the Exceptions Order¹⁵.

- '(1) . . . a caution is a protected caution if—
- (a) the person was under 18 years at the time the caution was given; or

¹² Available at <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

¹³ SI 2013/1198.

¹⁴ SI 2020/1373,

¹⁵ SI 1975/1023.

- (b) where the person was 18 years or over at the time the caution was given, it was given to a person for an offence other than a listed offence, and six years or more have passed since the date on which the caution was given.'
- '(2) . . . a person's conviction is a protected conviction if the conditions in paragraph (3) are satisfied and—
- (a) where the person was under 18 years at the time of the conviction, five years and six months or more have passed since the date of the conviction; or
- (b) where the person was 18 years or over at the time of the conviction, 11 years or more have passed since the date of the conviction.'

The conditions contained in paragraph (3) in relation to a protected conviction are:

- the conviction cannot have been for a 'listed offence' and;
- the sentence did not involve custody or service detention.;

The listed offences are defined in paragraph (5) and are all reasonably serious:

- (a) an offence under section 67(1A) of the Medicines Act 1968;
- (b) an offence under any of sections 126 to 129 of the Mental Health Act 1983;
- (c) an offence specified in the Schedule to the Disqualification from Caring for Children (England) Regulations 2002;
- (d) an offence specified in Schedule 15 to the Criminal Justice Act 2003;
- (e) an offence under section 44 of, or under paragraph 4 of Schedule 1 or paragraph 4 of Schedule 4 to, the Mental Capacity Act 2005;
- (f) an offence under section 7, 9 or 19 of the Safeguarding Vulnerable Groups Act 2006;
- (g) an offence specified in section 17(3)(a), (b) or (c) of the Health and Social Care Act 2008, apart from an offence under section 76 of that Act;
- (h) an offence specified in the Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009;
- (i) an offence specified in Schedule 2 or 3 of the Childcare (Disqualification) Regulations 2009;
- (j) an offence superseded (whether directly or indirectly) by any offence falling within paragraphs (a) to (i);
- (k) an offence of—
- (i) attempting or conspiring to commit any offence falling within paragraphs (a) to (j), or
- (ii) inciting or aiding, abetting, counselling or procuring the commission of any such offence,
- or an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) committed in relation to any such offence;

- (l) an offence under the law of Scotland or Northern Ireland, or any country or territory outside the United Kingdom, which corresponds to any offence under the law of England and Wales falling within paragraphs (a) to (k);
- (m) an offence under section 42 of the Armed Forces Act 2006 in relation to which the corresponding offence under the law of England and Wales (within the meaning of that section) is an offence falling within paragraphs (a) to (k); or
- (n) an offence under section 70 of the Army Act 1955, section 70 of the Air Force Act 1955 or section 42 of the Naval Discipline Act 1957 of which the corresponding civil offence (within the meaning of that Act) is an offence falling within paragraphs (a) to (k).¹

As a consequence, for most purposes **including licensing**, a DBS certificate (whether basic, standard or enhanced) will not reveal the existence of either a protected caution or a protected conviction (see Article 3(2) of the Exceptions Order as amended).

Exceptions to protected convictions and protected cautions

However, there are some situations where exceptions apply and in those circumstances, a Basic, Standard or Enhanced DBS Certificate will reveal protected cautions or protected convictions. These relate to questions asked about the suitability of a person to work in certain fields as defined in Article 3ZA. **In relation to licensing, this only concerns shotgun and firearm, explosives and poisons licences.**

This particular area has become confused because the Government Guidance¹⁶ uses a term (“utmost integrity”) to describe such completely exempted occupations. On page 10 of the Guidance it states:

“There are a small number of jobs or activities for which the **utmost integrity** is required. In order to maintain public trust and confidence, **full disclosure** of all convictions and cautions, including protected cautions and convictions, must be made. These are generally jobs or activities relating to national security, police constables, judicial appointments and firearms certificates. You will be informed by the employer, organisation or licencing body if full disclosure is required when applying for these jobs or activities. Please be aware, disclosure of criminal records in these instances is not provided by the Disclosure and Barring Service. [emphasis in the original]”

The term “utmost integrity” is not contained within either the ROA 1974 or the Exceptions Order (both as amended) and this has led to confusion. The appointments, occupations and activities covered by the exemption contained in Article 3ZA are:

¹⁶ “Guidance on the Rehabilitation of Offenders Act 1974 and The Exceptions Order 1975” available at <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

- Judicial appointments;
- Constables and persons appointed as police cadets to undergo training with a view to becoming constables and naval, military and air force police;
- Any office or employment in the Serious Fraud Office;
- Any office or employment in the National Crime Agency;
- The Commissioners for HM Revenue and Customs and any office or employment in their service;
- The Official Solicitor and his deputy;
- Persons appointed to the office of Public Trustee or deputy Public Trustee, and officers of the Public Trustee;
- Any office, employment or other work which is concerned with the establishment or operation of a database under section 12 of the Children Act 2004, and which is of such a kind as to enable the holder of that office or employment, or the person engaged in that work, to have access to information included in the database;
- Any office, employment or other work which is of such a kind that the person is or may be permitted or required to be given access to a database under section 12 of the Children Act 2004;
- Firearms dealer;
- Any occupation in respect of which the holder, as occupier of premises on which explosives are kept, is required pursuant to regulations 4, 5 and 11 of the Explosives Regulations 2014 to obtain from the chief officer of police a valid explosives certificate certifying him to be a fit person to acquire or acquire and keep explosives;
- Firearm certificates and shot gun certificates issued under the Firearms Act 1968, and permits issued under section 7(1), 9(2) or 13(1)(c) of that Act; and
- Explosives certificates issued by a chief officer of police pursuant to regulations 4, 5 and 11 of the Explosives Regulations 2014 as to the fitness of a person to acquire or acquire and keep explosives;
- Licences granted under section 4A of the Poisons Act 1972

In addition, Article 3ZA also applies to:

“ any question asked by or on behalf of any person, in the course of his duties as a person employed in the service of the Crown, the United Kingdom Atomic Energy Authority or the Financial Conduct Authority or the Prudential Regulation Authority in order to assess, for the purpose of safeguarding national security, the suitability of the

person to whom the question relates or of any other person for any office or employment where the person questioned is informed at the time the question is asked that, by virtue of this Order, spent convictions are to be disclosed for the purpose of safeguarding national security;

Finally, Article 3ZA also applies to:

“any question asked by or on behalf of the Victims' Payments Board, where—

- (i) an application for payments under the Victims' Payment Regulations 2020 has been made;
- (ii) the question relates to the person whose disablement the application concerns, and
- (iii) the question is asked in order to assess whether regulation 6(1) (convictions) of the Victims' Payment Regulations 2020 excludes the person from entitlement to payments.

In relation to these situations, provided that the person is informed, at the time the question about previous convictions is asked, that spent convictions are to be disclosed, they can be both disclosed and subsequently used in relation to decisions about those situations.

Protected convictions and protected cautions in relation to local authority licensing

As a protected conviction or caution must be for a matter which was committed a significant time ago, it is highly unlikely that any of these in isolation would have had an impact on the grant or continued retention of any local authority TfL/TPH licences, and in general the impact on local authority licensing of this alteration is negligible. There are however situations where a person with a history of continued offending will, after a period of time, be able to present as somebody of rather better character than is actually the case.

It is important to recognise that even an enhanced DBS certificate will not reveal all convictions and cautions¹⁷. **Protected convictions and cautions cannot be considered in relation to any licensing matter, even if the licensing authority is aware of them.** The authority could become aware of a protected conviction or caution because it was revealed on an application form or statutory declaration by an applicant who did not realise that it was protected, or through historic records relating to existing licensees.

¹⁷ The Disclosure and Barring Service has published a list of convictions which will always be disclosed. It is available at <https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check>

It is vital that licensing authority officers are familiar with the legislation and do not allow any information about a protected conviction or protected caution to be passed on to any other person or decision-maker.

Any person who does reveal information about a spent conviction or caution (which appears to include protected convictions and protected cautions, although this is not specified in the legislation) runs the risk of prosecution.

ROA 1974 S9(2) states:

“(2) Subject to the provisions of any order made under subsection (5) below, any person who, in the course of his official duties, has or at any time has had custody of or access to any official record or the information contained therein, shall be guilty of an offence if, knowing or having reasonable cause to suspect that any specified information he has obtained in the course of those duties is specified information, he discloses it, otherwise than in the course of those duties, to another person.”

Identical wording is contained in s9A(2) in respect of spent cautions.

Although there may be a defence if the disclosure was in the course of official duties, this is not a situation in which any local authority officer or member would wish to find themselves.

The effects of rehabilitation

Once a person has been rehabilitated, the provisions contained in ROA 1974, s 4(1) come into effect:

‘4.— Effect of rehabilitation.

(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.’

On the face of it, this would prevent a local authority or TfL, in the discharge of its licensing functions, from enquiring about any spent convictions.

ROA 1974, s 4(2) prevents any questions about spent convictions being asked other than by a judicial authority.

The Exceptions Order as amended, was made under ROA 1974, s 4(4). Article 3 excludes the provisions of s 4(2) from applying in relation to questions asked by a person in the course of their duties or employment who is ascertaining the suitability of an individual in relation to certain occupations. These occupations are listed in Schedules 1 and 2 to the Exceptions Order. Since March 2002 hackney carriage and private hire drivers, both outside and within London, have been listed (referred to as 'taxi drivers') as 'regulated occupations' in Sch 2 para 4 of the Exceptions Order. The effect of this in relation to hackney carriage and private hire drivers is to render ROA 1974 inapplicable. For all practical purposes (except protected convictions and protected cautions), it is as if ROA 1974 had never been passed for taxi drivers.

Hackney carriage proprietors and private hire operators and proprietors, and other licensees (except shotgun and firearm, explosives and poisons) are not listed in the Exceptions Order.

In relation to unlisted occupations, it was recognised that there was a danger to the public in certain situations where a person with undesirable convictions could seek the grant of a licence, and this was addressed by the provisions of ROA 1974, s 7(3).

Using 'spent' convictions

ROA 1974, s 7(3) states:

'(3) If at any stage in any proceedings before a judicial authority in England and Wales (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.'

The question is whether a hearing by a local authority licensing committee constitutes 'proceedings before a judicial authority'. This is defined in ROA 1974, s 4(6):

‘4–(6) For the purposes of this section and section 7 below “proceedings before a judicial authority” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

- (a) by virtue of any enactment, law, custom or practice;
- (b) under the rules governing any association, institution, profession, occupation or employment; or
- (c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.’

The decision in *Adamson v Waveney District Council*¹⁸ makes it clear that a local authority determining a licensing application, or taking action against a licence, is a judicial authority for these purposes.

This approach has been confirmed by the Court of Appeal in *Hussain v Waltham Forest London Borough Council*¹⁹ :

The Disclosure and Barring Service

The DBS provides three types of disclosure: basic, standard and enhanced. These relate to the certificates defined in The Police Act 1997 (PA 1997), Pt V.

‘Basic disclosure’ is the equivalent of a criminal conviction certificate (PA 1997, s 112) and is available to any individual. The disclosure is sent to the applicant, and it lists all current convictions within the meaning of ROA 1974. An employer or a local authority could ask an individual to provide an up-to-date basic disclosure certificate, and no registration with the DBS is necessary. Of course, an individual may refuse to obtain, or provide, a basic disclosure certificate, but that may adversely affect their chances of employment or of obtaining a licence.

‘Standard disclosure’ is the equivalent of a criminal record certificate (PA 1997, s 113A). This is only available to bodies or organisations that have registered with the DBS in respect of employment and positions which are excluded from the effects of ROA 1974 by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975²⁰, as amended.

¹⁸ [1997] 2 All ER 898.

¹⁹ [2020] EWCA Civ 1539 [2021] 1 WLR 922 CA per Hickinbottom LJ at para 53.

²⁰ SI 1975/1023.

If the subject has any convictions or cautions, the certificate will contain details of any current convictions or cautions (ie those which are unspent), any convictions which resulted in a custodial sentence (spent or unspent but excluding protected convictions) or any convictions for an offence specified in PA 1997, s 113(6D).

In all cases, the standard DBS Certificate is sent to the subject, who then has to provide it to the relevant body or organisation.

There are two types of enhanced disclosure: an enhanced disclosure and an enhanced disclosure with checks of the barred lists.

An enhanced disclosure certificate is the equivalent of an enhanced criminal record certificate (PA 1997, s 113B).

As with a standard disclosure, this is only available in respect of employment and positions which are excluded from the effects of ROA 1974 by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975²¹, as amended, but in addition, it must also be in respect of a purpose or occupation which is covered by the Police Act 1997 (Criminal Records) Regulations (as amended)²² Enhanced disclosures contain details of all current convictions, as well as spent convictions and cautions, reprimands or final warnings, plus details of other information held by the police, but not protected convictions or protected cautions. As with standard disclosures, the application must be countersigned by an authorised person on behalf of a body or organisation that has registered with the DBS²³. Again, the applicant is sent the DBS certificate, and then he has to show that to the local authority or TFL.

An enhanced disclosure with checks of the barred lists is the equivalent of an enhanced criminal record certificate (PA 1997, s 113B) plus the information accessed under ss 113BA and 113BB. This is available for purposes and occupations that are prescribed under regulations made under s 125.

In relation to local authority licensing, the only regulated occupation is a taxi driver (by virtue of Sch 1, Part III of the Exceptions Order).

As a result, an enhanced disclosure is required in relation to applicants for new drivers' licences, or renewals of existing licences. The section of the application form (Section X) which

²¹ SI 1975/1023.

²² SI 2002/233, reg 5(a)(zf) covers 'considering the applicant's suitability to obtain or hold a taxi driver licence'.

²³ A physical signature is not required if the application is made on-line in accordance with the DBS requirements: s 113(2A).

asks what the 'position applied for' is should be completed with 'other workforce' at Line X61 Line 1 and 'taxi licensing' at Line X61 Line 2, ticking the boxes to ensure that there is a check of the adult and child barred lists, as well as common law disclosure. This is in accordance with the DBS Guidelines²⁴.

Challenging a DBS Certificate

It is possible to challenge the information contained in a DBS Certificate if it is incorrect and that challenge can be brought by either an applicant or an employer (or local authority). These provisions are contained in PA 1997, s117

PA1997, s 118 allows a person to challenge the information included in the certificate which is covered by s 113BA (relating to children) on the grounds that it was either not relevant for the post applied for, or should not have been included.

In relation to incorrect information, an application must be made in writing to the DBS, which must then consider if the information is correct or not. Where the dispute concerns the additional information, the appeal lies to the Independent Monitor. This post was created by PA 1997, s 119B.

²⁴ 'How employers or organisations can request DBS checks for potential employees' section x61 (available at <https://www.gov.uk/guidance/dbs-check-requests-guidance-for-employers#avoiding-common-mistakes-on-the-dbs-application-form>) This makes it clear that applications that do not involve working with adults or children must use the description 'other workforce'. This accords with The Safeguarding Vulnerable Groups Act 2006 (Miscellaneous Provisions) Regulations 2012, SI 2012/2112. Regulations 24 and 25 define regulated activity in relation to vulnerable adults, but these regulations are specifically excluded for hackney carriage and private hire drivers by reg 26. It is generally argued that a hackney carriage or private hire driver does not 'work' with adults or children in the way specifically covered by the Safeguarding Vulnerable Groups Act 2006.