

Disregarding offences

deleting cautions and convictions for consensual sexual offences between gay and bi men



www.galop.org.uk

Disregarding offences: deleting cautions and convictions for consensual sexual offences between gay and bi men

On 1 October 2012, the Home Office introduced guidance which allows people in England and Wales with some historical convictions and cautions for consensual gay sex to apply to have those offences removed from their records.

This factsheet explains the recent changes in the law and how to make an application.

Background on offences for consensual gay sex

The Sexual Offences Act 2003 decriminalised consensual sex between men, abolishing the offences of buggery and gross indecency. These offences largely applied to gay and bisexual men, including those between the ages of 16 and 21 (before the harmonisation of the ages of consent in January 2001). Over the years, thousands of men were cautioned and, in many cases, prosecuted for these discriminatory offences.

Although consensual sex between men is no longer illegal, old convictions, cautions, warnings and reprimands can continue to cause great harm and distress. The Disclosure and Barring Service (formerly the Criminal Records Bureau) is obliged to disclose previous cautions and convictions on criminal records certificates and, in some cases, people have to disclose the fact of their caution or conviction when applying for jobs or voluntary positions. This has led to discrimination towards gay and bi men and is an unwelcome reminder of the stigma previously attached to homosexuality. It has prevented many men from seeking employment or training in certain fields.

The new legislation

The Protection of Freedoms Act 2012 ('the Act') introduced a new right for men with historic convictions and cautions on their records to apply to the to have them 'disregarded'. In October 2012, the Home Office introduced guidance explaining the application process.

If a caution or conviction is disregarded, it means that it will be treated as having never existed. In practical terms, this means that -

- Your records will be amended so that no information can be disclosed which would show that you were investigated for such an offence.
- You will not have to declare the conviction or caution when applying for jobs.
- No one will be able to disclose information about the 'offence' to a third party (such as your employer or potential employer).
- Information about the caution or conviction will not appear on a standard or enhanced criminal record certificate (now known as a DBS check).

This is explained more fully overleaf.

Does the new law apply to me and what offences can be disregarded?

Broadly speaking, the Act applies to convictions or cautions for:

- Having consensual gay sex with someone over 16;
- Gross indecency with another man (but see below regarding offences in public toilets); and
- Frequenting with intent (commonly known as loitering with intent).

Specifically, it covers cautions and convictions for offences under the following provisions:

Section 12 or 13 of the Sexual Offences Act 1956
Section 4 of the Vagrancy Act 1824
Section 61 of the Offences against the Person Act 1861
Section 11 of the Criminal Law Amendment Act 1885
Section 45 of the Naval Discipline Act 1866
Section 41 of the Army Act 1881
Section 41 of the Air Force Act 1917
Section 70 of the Army Act 1955
Section 70 of the Air Force Act 1955, and
Section 42 of the Naval Discipline Act 1957

Do not be concerned if you are unsure under which provision you were convicted or do not have any paperwork relating to the offence. The Home Office are aware that many people do not know exactly what offence they were charged with and that, in many cases, documentation has been lost. The application process is designed for you to provide as much information as possible to allow the Home Office to search your records.

People cautioned or convicted under the above provisions will only be able to have them disregarded if three key conditions are satisfied:

1) The other person(s) involved in the offence were

16 or over at the time of the offence;

2) The sex was consensual; and

3) The offence did not involve sexual activity in a public lavatory.

The Act does NOT apply to:

a) Anyone who was charged under provisions of any other statute, for example section 128 of the Mental Health Act 1959.

b) Where the sex was not consensual, or

c) Where it appears that either of the parties was under 16 at the time.

What if the offence took place in a public toilet?

A sizable number of convictions for gross indecency were for sexual acts in public toilets. Currently, the Government is unwilling to disregard these convictions on the basis that it is still illegal for anyone to have sex in a public toilet, regardless if they are gay, bi or straight (under section 71 of the Sexual Offences Act 2003). We consider that this is unfair, particularly as many gross indecency convictions were obtained by police entrapment. However, that is, unfortunately, the position in the legislation.

Please be aware that, even if your caution or conviction for a consensual act is disclosed on a DBS check, that should not be an automatic bar to employment. Many employers and education providers are aware of the discriminatory circumstances in which these cautions and convictions were administered and recognise that you do not pose any risk to others.

If you have any questions or concerns about this, speak to Galop on 020 7704 2040.

Do I need to apply to have a previous conviction disregarded?

Convictions will not be disregarded automatically, so if you want your conviction or caution to be disregarded, then you will have to apply to the Home Office.

Whether you decide to do so is a matter of personal choice. It will depend on your circumstances. If you are unlikely to ever require a DBS check, for example, then you may decide not to go ahead with the application process. You may not wish to have to revisit what may well have been a very difficult period of your life, when it will have little practical effect.

However, for those people who are still in employment, who wish to volunteer with certain organisations, or who simply wish to have this injustice removed from their record, applying for their caution or conviction to be disregarded could make a real difference.

Before applying

What information do the police retain about me already?

The police force that arrested you and investigated the offence should have kept records locally. This could include photographs, statements, reports from officers and any other documents produced during the investigation and prosecution. If you were arrested after 1995, then your information will be on the Police National Computer (PNC). Even if you were convicted prior to 1995, your information may also be on the PNC, because the police have been uploading their old microfiche records on to the new computer system.

If you received a caution over fifteen years ago, then it is possible that the police may have

'weeded' it from their records. This weeding out process was halted in 2006.

Why will this information be disclosed?

Information about your criminal convictions is usually only disclosed with your consent, although there are some circumstances in which it can be disclosed without prior notice, usually in connection with the prevention or detection of crime.

If you are applying for a job or a voluntary position where you will be working with under 18s or vulnerable adults as part of your regular duties, or if you work in one of a range of restricted professions, then you will be required to apply for a DBS check. You will usually be told about this in advance of applying for the job. DBS checks are not required for every job.

If you have been asked to agree to apply for a DBS check but do not think you should have been, speak to Galop on 020 7704 2040. It is unlawful for an employer to ask you to apply to the police for a 'subject access request' and then show it to them.

How can I find out what information has been retained about the offence?

There is no free-standing right to request a DBS check unless you are applying for a job or position that requires one. However, under the Data Protection Act 1998 you can apply to your local police force for a copy of all personal information that they hold on you. Such a request is called a "subject access request" (SAR). It will include information held on the Police National Computer. This guide from the Information Commissioner's website explains how to make a SAR: http://www.ico.gov.uk/for_the_public/topic_specific_guides/crime.aspx

The SAR will not necessarily contain all the

information that will be disclosed in DBS check and so should only be used as a guide as to what might be held. For example, the police may not disclose an old caution or allegation in response to an SAR, but they may include information relating to it on an enhanced DBS check, as it is a matter for the discretion of Chief Constable and what he considers to be relevant. You should not therefore assume that because no information is produced in response to an SAR, that no information is held.

Do I need to find out what information is held about me before applying?

No, you are not required to do so. If you have been convicted of or cautioned for one of the offences listed and meet the three conditions listed above then you are entitled to apply to have it disregarded. Once they have received your application, the Home Office will search for the available records.

How to apply

How do I apply?

There is an application form with guidance notes available on the Home Office website:

<http://www.homeoffice.gov.uk/publications/crime/decriminalised-sexual-offences/guidance-application?view=Binary>

Once completed, the form, along with relevant supporting materials and evidence of your identity and address, can be emailed or posted to the addresses on the form. Currently, these are:

Email: chapter4applications@homeoffice.gsi.gov.uk

Post: Chapter 4 Applications,
SPPU
4th Floor Fry Building
2 Marsham Street
London SW1P 4DF

What information do I need to provide?

You need to provide information for two purposes, namely so that the Home Office can

- 1) Determine who you are and identify the relevant conviction/caution/warning/reprimand and the records that are kept about it; and
- 2) Be satisfied that both parties were at least 16 at the time of the offence and that it was not conduct that would still be considered illegal (i.e. it was consensual and it did not take place in a public toilet).

For the first purpose you need to include:

- Your name and date and place of birth, as confirmed by enclosing a copy of your passport, driving licence, birth or adoption certificate, HM Forces ID card, or firearms licence; and
- Your current address, as confirmed by a recent copy of a bank/building society statement, utility bill, credit/store card statement, benefits letter, or Council Tax bill.
- For the second purpose you need to include:
- Your name, date of birth and statement address at the time of your arrest;
- Details of the conviction/caution you are applying to have disregarded, including:
 - o The date of your arrest
 - o The date you were charged
 - o The offence of which you were convicted or cautioned for
 - o The relevant police force and station
 - o The name of the court you were convicted at (if applicable) and
 - o Your Court Criminal Record Case Number (if applicable and known).
- Details of the circumstances of the offence, and
- Any other information or further materials (copies only) that you consider would assist in satisfying the Home Secretary that your conviction or caution qualifies to be disregarded.



Note that if you are applying for more than one conviction or caution to be disregarded, then you should complete the second lot of information (Part B of the form) for each offence.

How much information should I provide?

Include as much information as you consider is necessary or helpful. Bear in mind that you will need to satisfy the Home Secretary that both parties were at least 16 and that the offence would not be illegal today (i.e. it was consensual and it was not in a public toilet).

However, as indicated above, do not be concerned if you do not have the relevant paperwork as the Home Office will search for this.

Will the information be disclosed?

None of the information you provide as part of your application will be used for any purpose other than considering your application. The Home Office say they will not disclose the information to any person or organisation not involved in the process without your consent. Your application and materials will be retained for 6 years and then destroyed.

Can someone else apply on my behalf?

Yes. You will need to sign the application form, but you can ask that someone else completes the details for you. If you would like another person or organisation to be contacted about the progress of your application, you can include a signed letter with that person's contact details along with your application form. The letter must state that you consent to that person being contacted about your application.

This could be an attractive option if you are concerned about post going to your home address. If you live in the London area and would like Galop

to assist, please contact us on 020 7704 2040 or at info@galop.org.uk.

How will I know if it has been disregarded?

Once you make your application, you should receive an acknowledgement from the Home Office that it has been received and is being processed. You will then be informed of the Home Secretary's decision. If your application is successful, the Home Secretary will write to the relevant organisations who hold data, and they will then have 14 days to delete or annotate the records. Each organisation will then write to you to confirm that they have deleted or annotated the record.

How long will it take for a decision to be made?

The Home Office anticipate that it will take at least 12 weeks to process applications. In particularly complex cases, or where records cannot be found, it may take longer.

Appeals Process

Can I appeal?

If you consider that a mistake on your application form may have led to it being denied, or if you have further evidence to submit that you believe helps your application, you can contact the Home Office, who will review your application based on these new representations.

There is no right to make oral submissions. The Home Secretary will make a decision on the papers only. As the High Court on an appeal will only be able to consider matters that the Home Secretary has looked at (see below), it is important that you put in full representations at this stage as to why your conviction should be disregarded. Please contact us if you require help with this.

No formal scheme has been established for this initial review stage, so until we hear otherwise, the contact details will probably be the same as for the initial application, as provided above.

If you disagree with the Home Secretary's final decision, you have the right to appeal to the High Court to review it. The High Court must first agree to hear the appeal, and will then only be able to make a decision based on the evidence you sent to the Home Secretary (i.e. you will not be able to submit further information at this stage or make a speech to the Court). If the Court agrees that your application should have been granted, then it can make that order and it will have the same effect as if the Home Secretary had decided it.

If the High Court instead agrees with the Home Secretary that your conviction or caution should not be disregarded, there is no appeal from that decision.

If you have particular concerns about this, please contact Galop.

Other questions about the applications process

Do I need to speak to a solicitor?

The process has been designed so that you can make the initial application without having to use a solicitor. However, if your application is denied at first instance or on appeal, or if the matter is particularly complex, then you may wish to discuss your particular circumstances with a solicitor before deciding on next steps.

Will it cost?

There will be no direct cost to you to make the application, other than your time and any expenses in locating the evidence you wish to submit. If you

consult with a solicitor or wish to appeal a refusal of your application to the High Court, then there will be costs involved, including court fees.

What are the implications for me if the Home Office refuse to disregard the offence?

As indicated above, even if your conviction/caution is not disregarded and is subsequently disclosed on a DBS check, it will not be an automatic bar to employment. It may assist to make employers or potential employers aware of the discriminatory circumstances in which these offences were introduced and pursued, in order to persuade them that the fact of a caution or conviction does not mean that you pose a risk. If you would like to discuss this, please contact Galop.

Other questions

Do I still have to declare the caution/conviction on a CRB/DBS form?

If your conviction or caution has been disregarded, you will not have to declare it on a DBS form or any other form. For all purposes, it will be as if you never received the conviction or caution.

What exactly does disregarding mean in practice? E.g. can the conviction still be disclosed?

The Act says that a person with a disregarded conviction or caution will be treated for all purposes in law as if they had not:

- a) committed the offence;
- b) been charged with or prosecuted for the offence;
- c) been convicted of the offence;
- d) been sentenced for the offence; or
- e) been cautioned for the offence.

There a number of practical effects. First, no

evidence will be allowed in any court or tribunal relating to conviction or caution. No one acting in an official capacity may question you directly about it, nor may they ask you questions that, if you answered, would reveal you had the caution of conviction. For example, if you had been sent to prison because of a conviction that was now disregarded, you could not be asked whether the police had ever investigated you for that crime, and if you were asked if you had ever been in prison, you would only have to say so if it was for something other than the disregarded conviction.

Second, you will be able to treat any other questions about previous convictions, cautions, offences, conduct or circumstances (such as on employment forms) as not relating to the disregarded conviction or caution, or to any circumstances connected to it. For example, if you are asked on an employment form whether you have ever been investigated by the police for a crime, then you would not have to state anything relating to the investigation that led to your disregarded conviction or caution.

Third, your disregarded conviction or caution, and the circumstances surrounding it, cannot be used as a reason to dismiss you from a job, expel you from an organisation, office or profession, or be used to prejudice you in any way. For example, if your employer has a policy that all convictions must be disclosed and you do not disclose your disregarded conviction and they find that out, they cannot then fire you for not complying with the rule because you were entitled not to disclose your disregarded conviction.

Why can't it be completely deleted from the PNC?

The Home Office have confirmed that they will delete records of disregarded convictions or cautions which are kept electronically in the 'names database' on the PNC. Where any record in the names database is held non-electronically (e.g.

in a local police file), it will instead be annotated with a note stating that it relates to a disregarded conviction or caution and should not be disclosed, and any records held by local police forces or the courts. The Home Office say that this is because some records cannot simply be deleted as the relevant information will appear on a page with many other entries.

They have also indicated that records held by the courts and local police forces (i.e. other than on the PNC) will be annotated instead of deleted, even where held electronically. No rationale has been given for why records held electronically by the courts or local police should not be deleted.

What if I have more than one conviction?

If you have more than one eligible conviction, caution, reprimand or warning, these can all be included in the same application. Section B of the application form – which relates to the incident in question – can be copied and completed as many times as necessary for each entry, and all submitted as part of the same application.

What if I'm a teacher or similar in position of responsibility?

If you are a teacher or childcare worker you will probably already have had to apply for an enhanced CRB check (now a DBS check). Your conviction or caution would therefore already have been disclosed. If you have not yet had a DBS check but are likely to need one in the near future, then you should apply immediately for your caution or conviction to be disregarded (assuming that you meet the criteria set out above).

Although there is no provision for the Home Office to 'fast track' an application, it is worth explaining in a covering note the reasons for the urgency. You may also wish to consider writing to the DBS and relevant police force simultaneously to say that you

have made an application for your conviction to be disregarded and to ask that they hold off making any disclosure until the Home Secretary has made a decision.

What if the offence took place in something like a hospital or care home?

So long as the conviction or caution was made under section 12 or 13 of the Sexual Offences Act 1956 (or its predecessor acts or the military equivalents – see above) then it is eligible for disregarding. Offences under any other act, even if they would otherwise be equivalent to these offences, are not eligible to be disregarded. This includes a conviction or caution made under s. 128 of the Mental Health Act 1959.

What if the offence took place in a cruising ground, eg. Hampstead Heath

So long as the conviction or caution (or warning or reprimand) was made under one of the relevant laws (see above) then it will be covered by the Act. The one exception to this is an offence that took place in a public lavatory, which is not covered, because it is still illegal (again, see above).

Can I apply to have my conviction re-investigated?

The right under this Act is merely to have eligible conviction and cautions disregarded because they are, rightly, no longer considered crimes. There would be no need to have such a conviction re-investigated because it is now not a crime. There is no right to have an ineligible conviction re-investigated under the Act.

Can I see my record?

You can apply to your local police force for a copy of information that they hold on you, which should include any information relating to an offence or alleged offence. Such a request is called a “subject

access request”. This guide from the Information Commissioner’s website explains how to go about this: http://www.ico.gov.uk/for_the_public/topic_specific_guides/crime.aspx See above.

What if it’s already been disclosed on a criminal record certificate?

If you have had a CRB or DBS check which disclosed a conviction which you later successfully apply to have disregarded, it should not show up on future DBS check. If you have lost a job or position as a result of the check, you may wish to inform your employer/potential employer that the conviction has now been disregarded in order that they may apply for a new DBS check. However, in most cases it will be too late to do so.