



# THE FACULTY OFFICE

*This guidance is prospective ready for the coming into force of the Exceptions Order*

## GUIDANCE ON CRIMINAL CONVICTIONS AND CAUTIONS

### 1. Introduction

**1.1.** This guidance sets out the Faculty Office's approach to considering criminal convictions of notaries and notary applicants.

### 2. Background

#### 2.1 The nature and sensitivity of the role of notaries

Notaries, in their capacity, carry out professional activities that require a high degree of trust and confidence. Integrity is central to the notarial profession and the office of a notary. Notaries are appointed by a Faculty issued in the name of the Archbishop of Canterbury and under the seal of the Archbishop's Faculty Office. The Faculty states that "full faith ought to be given as well in Judgment as thereout to the instruments to be from this time made by you", which means that courts, other authorities, and all recipients of notarial acts should be able to trust those acts without further enquiry. They are trusted with sensitive information and client money. Their notarial certificates are intended to be indisputable evidence of facts. They are also authorised to carry out conveyancing, probate and to act as commissioners for oaths. It is therefore necessary that notary does not have a criminal background that would make them unsuitable person to carry out the work of a notary. The ethical character of a notary is wider than avoiding criminal behaviour, but criminal behaviour is directly relevant to whether a notary has shown themselves to have acted ethically and in a law abiding manner.

#### 2.2 The Faculty Office as regulator

The Master of the Faculties appoints and regulates notaries through the Faculty Office. Under the Legal Services Act 2007 Act, only a person authorised by an approved regulator, may provide a reserved legal activity. Reserved legal activities are deemed to require a greater degree of skill or training, to ensure public and consumer protection and to uphold the important constitutional principle of the rule of law and include such things like advocacy and litigation. The role of the Master of the Faculties as an approved regulator under the 2007 Act is therefore, to regulate notaries public in the public and consumer interest. This includes the admission at the outset and then regulation of the day-to-day activities of notaries, together

with the setting of education and training requirements to become a notary and discipline and conduct issues.

### **2.3 The Faculty Office as an anti-money laundering supervisor**

The Faculty Office is a Professional Body Supervisor for money laundering supervision in the case of notaries in England and Wales. The Money Laundering Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017, particularly the approval process for beneficial owners and managers) require that the Faculty Office undertake a further level of due diligence of notaries on a risk-based approach. This will, in some cases, require an investigation of spent convictions and cautions.

## **3. The law on criminal records**

### **3.1. The Rehabilitation of Offenders Act 1974 (“the 1974 Act”)**

The principal aim of the 1974 Act is to support the rehabilitation into employment of reformed offenders. After a period of time, the conviction and/or caution (with some exceptions) becomes spent which means that the offender is regarded as rehabilitated. Such a person is not required to declare or disclose their spent caution(s) or conviction(s) in any context. The result is that the criminal conviction can be ignored. These are commonly referred to “spent” convictions and cautions.

### **3.2. The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975**

This order makes exceptions in the operation of the 1974 Act. Certain professions and employment are by that order excepted from the application the 1974 Act which means that where the exception applies such a person may have to declare spent cautions and convictions. The rationale being that there are certain jobs and professions for which a complete knowledge about a person’s background is required for the protection of the public. There is a filtering system which means after a set period of time, most spent cautions and convictions become protected, and therefore do not have to be declared even to a body which benefits from the exception order, such as the Faculty Office.

### **3.3. Excepted Professions**

Since 2023 the profession of notaries has been excepted profession which allows the Faculty Office to ask for and consider conviction and cautions that are spent, but not filtered, as well as those which are unspent.

### **3.4 Disclosure and barring checks**

The Disclosure and Barring Service (“DBS”) was established under the Protection of Freedoms Act 2012 to carry out the functions of the former Criminal Records Bureau and the Independent Safeguarding Authority. The DBS has, inter alia, the following statutory duties:

- To hold and maintain a register of organisations approved by the DBS to submit applications for criminal records certificates.

- To issue three levels of certificates of criminal records:
  - o Basic Certificate – This contains details of convictions and conditional cautions that are considered to be unspent under the terms of the Rehabilitation of Offenders Act 1974. An applicant will apply for a Basic Certificate directly and use it for a wide variety of employment or other purposes.
  - o Standard Certificate – This is available to those working in roles specified in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment)(England & Wales) Order 2014. Standard Certificates show current and spent convictions and, cautions held on the Police National Computer.
  - o Enhanced Certificate – This is the highest level of check available to anyone involved in regularly caring for, training, supervising or being in sole charge of vulnerable groups, including children and other positions involving a high degree of trust. Enhanced Certificates contain the same information as a Standard Certificate but with the addition of relevant additional information held by a police force at local level rather than national and, in some cases, where permitted to request, details of whether the person is on the lists of those barred from working in the children’s and/or adult’s sector.
  - o None of the certificates mentioned will show ‘protected’ offences, for which see paragraph 3.5.
  - o There is also an Update Service to which individuals can subscribe which will allow them or their employer or voluntary organisation to check whether any new criminality information that is deemed relevant to their employment sector is held on them.

The following table summarises the information disclosed under each level of certificate:

DBS Check Level/Information provided	Basic	Standard	Enhanced	Enhanced + Barred Lists
Unspent convictions				
Spent convictions (subject to filtering)				
Cautions (subject to filtering)				
Police intelligence				
Inclusion on children’s barred list				
Inclusion on adult’s barred list				

### 3.5 The effect of filtering

Disclosure rules for criminal records are commonly referred to as “filtering”. Filtering is the term the Government uses to describe the process that identifies which criminal records will be disclosed on a Standard or Enhanced DBS certificate. Certain old or minor offences may not be disclosed on DBS certificates. These are known as ‘protected’ offences. The Faculty Office has no right to know about ‘protected’ offences and cannot ask for information about them. Unlock has more [guidance](#) about what is a ‘protected’ offence and what is not.

There is a [list of offences](#) that will always be disclosed on a Standard or Enhanced DBS certificate (unless they relate to a youth caution). These are known as ‘specified offences’ and are usually of a serious violent or sexual nature, or are relevant for safeguarding children and vulnerable adults.

All convictions resulting in a custodial sentence, whether or not suspended, will always be disclosed.

Youth cautions, warnings and reprimands will not be disclosed automatically on a Standard or Enhanced DBS certificate.

## 4. The Faculty Office’s approach to inquiring as to the criminal record of notaries

**4.1** Almost all notaries have no criminal record, and no spent or unspent convictions and cautions whatsoever. It should be noted therefore that this policy relates to the minority of cases.

**4.2** Criminal acts are relevant for the notarial profession because:

- Notaries must maintain the trust and confidence of the public as otherwise their notarial certificates and other works would diminish and they would cease to provide the same certainty to transactions and other business for the public who rely on them. Engagement in criminal activity of whatever kind has the potential to damage public trust and confidence as there is a legitimate expectation that notaries, who are legal officers themselves and who apply the law, will also abide by those laws.
- Engagement in criminal activity could suggest that a person is disposed to committing unlawful acts and therefore be an inappropriate person to be placed in a position of trust and confidence over their client’s affairs.
- Engagement in criminal activity can lead to further criminality if criminal elements obtain control over a person and that person has become complicit in criminal schemes.
- Questions as to the mental judgement and culture of a person are legitimately raised when a person decides to engage in criminal activity. Only a person of probity with the mental wherewithal to resist temptation to commit criminal acts should be entrusted to exercise the position of responsibility that a notary has.

- The Money Laundering Regulations require that persons carrying out certain legal work that falls within the ambit of those regulations are fit and proper persons, having regard, amongst to other factors, their criminal record.

#### 4.3 Not all criminal acts are the same

It is understood that not all criminal acts have the same importance. A minor road traffic offence is of less importance than theft. The Faculty Office when considering a criminal record will therefore consider the importance of a criminal act and its relevance to the work of a notary.

#### 4.4 How does the Faculty Office make inquiries as to the criminal record of notaries?

- At admission as a new notary – notary applicants are required to make a declaration that they have not been convicted of any offence (other than a ‘protected’ offence or a minor road traffic offence). Additionally, those would-be notaries who wish to enrol on the required course to become a notary are asked to make the same declaration. References are also obtained. The Faculty Office obtains a **standard disclosure and barring certificate** on the notary applicant on application for admission as a new notary. The standard check includes spent convictions and cautions provided that they are not protected. The cost of obtaining the certificate is passed onto the notary.
- While in practice as a new notary – a notary who (whether in England and Wales or elsewhere) is convicted of an offence or is charged with committing an offence or who is declared bankrupt is under a duty, within the period of twenty-eight days following the conviction or arrest or the declaration of bankruptcy, to inform the Faculty Office. A notary in practice must submit a **basic disclosure and barring certificate** annually. A new basic check should be applied for every 5 years and in the intervening period the old certificate can be supplied. The cost of obtaining the certificate is borne by the individual and they must make the application. This check does not however reveal spent convictions and cautions.
- Through regulatory information sharing and intelligence checks – the Faculty Office is privy to information sharing networks with other legal regulators and makes use of the special intelligence sharing networks. These intelligence sharing fora and platforms might reveal evidence of activity that falls short of criminal activity (such as disciplinary sanctions by another regulator) or which has not led to a criminal conviction.
- In particular cases where the Faculty Office has a suspicion that a notary has not disclosed required criminal history or is otherwise under suspicion as a result of intelligence received as engaging in criminal activity or conduct that breaches regulatory rules, the Faculty Office may decide to conduct a **standard disclosure and barring search** or exceptionally, an **enhanced check** with or without with a check of the Barred Lists (ie on a list of persons barred from working with children). An enhanced check is only likely to be needed where the notary is managing the finances of a vulnerable client under a power of attorney and where the suspicion is that the notary has been banned from working with vulnerable groups and has not disclosed

this or where the police record may have some information relevant to the suspicion formed. Such checks will be made as required by the level of risk and the likely relevance of the information obtainable from the DBS system.

- The Faculty Office does not currently use the Update Service for disclosure and barring checks but will keep this under review.

### 5.1 What happens if a notary applicant has a criminal record?

The distinction needs to be made between a person applying to a notary and someone who is already admitted as such. In the latter case, the committing of a criminal offence will trigger a disciplinary process under the Notaries (Conduct and Discipline) Rules 2015. The matter will be investigated and heard by a panel under those rules and this guidance is not intended to cover such situations. It is in the former case, for would-be notaries, that the following guidance has been written.

The possession of a criminal record does not of itself preclude a person from becoming a notary. The Master will personally consider each case, having regard to this guidance. The following factors are relevant when considering whether a criminal record should prevent a notary applicant from being admitted:

Factors which would make it more likely that the person be refused a faculty to practise:

- The offence involves dishonesty, deception etc, or the person has been dishonest when challenged about the offence or in the course of investigation for the offence. Honesty is a paramount characteristic of a notary
- The offence concerns theft of money or abuse of a position of trust – such an offence might suggest that the person cannot be trusted to exercise a position of trust, inter alia in relation to a client's money or property
- The offence has carried a custodial sentence – this would suggest that the offence was considered in the eyes of the law to be so serious as to warrant imprisonment
- The offence was recent – this might suggest that the person is a live risk of current criminality
- The offences were repeated or there is otherwise a pattern of offending which might suggest that the criminality is habitual rather than out of character
- Just because the offence is "spent" does not mean that it ceases to be relevant for the purposes of the Faculty Office. The profession of notary is excepted from the Rehabilitation of Offenders Act 1974 because it is recognised that the profession is a sensitive one where spent convictions and cautions may continue to be relevant
- Protected offences however cannot be taken into account by the Faculty Office whether or not disclosed.

Factors which will be taken into account by way of mitigation are:

- The offence was not premeditated or highly reckless, ie it was accidental or otherwise unwitting
- The offence did not carry a custodial sentence

- The offence relates to a “one-off” act or omission which was otherwise out of character
- There was as no dishonesty and the person cooperated with the investigatory authorities
- The offence was a long time ago – particularly in case of offences committed as a juvenile (ie up to the age of 18) – and the person has demonstrated that they are no longer the sort of person who would commit such an offence again. They have demonstrated rehabilitation
- There was some exceptional mitigation, eg provocation, mental illness, which meant that the guilty person was not wholly culpable for their actions.

In rare cases, law breaking can show a person to have been acting ethically because there was a greater good to be achieved than the law represented. However, in the vast majority of cases it will be unlikely that the Master will go behind the wisdom of the law itself. The motivation or “*mens rea*” in legal language may sometimes be relevant in mitigation especially in strict liability offences.

## 5.2 What information might the Master take into account when considering such cases?

The Master will consider:

- The criminal conviction
- Any available record of the judicial decision and court papers
- Any statement by the notary applicant in mitigation
- Any similar cases
- Any representations received from eg victims

The Master may decide to refer the case to someone with expert specialism in the matter or request an expert report.

## 5.3 What is expected of the notary applicant?

It is expected that the notary applicant will be wholly candid in accounting for their personal history and not hide matters relating to unprotected criminal convictions from the Master. On the other hand, individuals can not apply for their own Standard DBS check, and due to the complexity of the law, some applicants may not disclose something spent, if they did not realise it was still disclosable.

## 5.4 What can the notary applicant expect from the Faculty Office?

That the Faculty Office will act courteously and reply to communications promptly. That reasons for the Master’s decision to admit or not to admit the notary will be provided in writing.

## 5.5 What can the notary applicant do if they disagree with the Master’s decision?

If the decision is not to admit the person as a notary, the person may apply to the Chancellor of the High Court for the decision to be overturned. In such a case the person should obtain legal advice.

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