

APPENDIX B DISCLOSURE OF CRIMINAL RECORDS INFORMATION IN OTHER JURISDICTIONS

INTRODUCTION

B.1 This appendix covers the practices surrounding the disclosure of criminal records information in the following countries:

- (1) Northern Ireland;
- (2) Scotland;
- (3) France;
- (4) The Netherlands;
- (5) Germany;
- (6) Spain; and
- (7) Sweden.

NORTHERN IRELAND

B.2 Northern Ireland operates a filtering regime in relation to standard and enhanced criminal record certificates which is very similar to that in place in England and Wales. The Northern Ireland legislative framework is governed by the Rehabilitation of Offenders (Northern Ireland) Order 1978; the Rehabilitation of Offenders (Exceptions) Order 1978 and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014. The 2014 amendments to the Police Act 1997 introduced the process of filtering in line with the recent developments in England and Wales. As in England and Wales, non-filterable offences are governed by section 113A(6D) of the Police Act 1997. The Northern Ireland Department of Justice described the list in section 113A(6D) as:

A range of offences which are serious, relate to sexual or violent offending or are relevant in the context of safeguarding. It would never be appropriate to filter offences on this list. In addition, the legislation covers equivalent offences committed overseas.¹

¹ Available at: <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/ani-cirulcar-1-2014.pdf> (last visited 26 January 2017).

- B.3 The disclosure of criminal records certificates and the filtering of criminal records information is undertaken by AccessNI, a branch within the Northern Ireland Department of Justice, who have made a list of non-filterable offences applicable to Northern Ireland available online.²
- B.4 One clear divergence between the English and Welsh and the Northern Irish filtering regimes is the review mechanism in place in Northern Ireland. This was introduced by the Justice Act (Northern Ireland) 2015, and is now found in section 117B and schedule 8A of the Police Act 1997. The review mechanism allows for the appointment of an “independent reviewer”.
- B.5 Any person whose standard or enhanced criminal record certificate includes a spent conviction, or any other spent disposal, may apply for a review of the inclusion of that matter on the certificate. A new certificate will be issued without the information in question if the independent reviewer is satisfied that:
- (1) removing those details would not undermine the safeguarding or protection of children and vulnerable adults, or pose a risk of harm to the public; and
 - (2) the spent conviction or other disposal should be removed.
- B.6 Offences can be reviewed, and can be removed from certificates, even if:
- (1) the offence is on the “non-filterable” list;
 - (2) the person has multiple convictions (which would otherwise mean that the offences on their certificate could not be filtered); and
 - (3) the appropriate time period which would make a conviction or disposal filterable has not yet passed (provided that the conviction is spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978).
- B.7 The Northern Ireland Department of Justice has issued guidance on the operation of the review system.³ In coming to a decision on whether or not information should be included on a certificate, the Independent Reviewer will consider issues such as:
- (1) the nature of the position being applied for;
 - (2) the seriousness of the offence(s);
 - (3) how long ago the offence(s) occurred;
 - (4) how many offences are being disclosed and, if more than one, whether or not they arose out of a single court hearing;

²

<https://www.nidirect.gov.uk/sites/default/files/publications/List%20of%20Specified%20Offences%20.pdf> (last visited 27 January 2017).

³

Para 5.7 of the guidance can be found at: <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/guidance-for-the-operation-of-the-criminal-records-filtering-review-scheme.pdf> (last visited 27 January 2017).

- (5) if applicable, when the information would fall to be considered for filtering;
and
 - (1) the age of the applicant at the time of the offence(s), including, in those cases where the applicant was under the age of 18 years, the need to have the best interests of children as a primary consideration.
- B.8 Where a certificate would only contain spent convictions or disposals that occurred when the person concerned was under the age of 18, the independent review takes place automatically, before the certificate is issued.
- B.9 In all cases, even if the independent reviewer has decided that information is not to be disclosed on an enhanced certificate, the information in question may still be disclosed on the certificate by the police.⁴ Between 1 March 2016 and 20 January 2017 the number of certificates, which could be eligible for review, issued by AccessNI was 95,875. Of these, 341 cases were auto-referred to the independent reviewer prior to a certificate being issued with 265 resulting in information being amended or removed. In this same period, 49 cases were the subject of a review request following the issue of a certificate with 43 resulting in the removal or amendment of information.⁵
- B.10 The system has been the subject of a recent successful challenge in the Northern Ireland Court of Appeal.⁶ The Court, in dismissing the Department of Justice's appeal, affirmed the decision of Treacy J in the High Court⁷ in relation to the statutory provisions concerning the disclosure of conviction information on enhanced disclosure certificates (and the parallel requirement for self-disclosure to an employer). The blanket disclosure of all convictions where there is more than one, irrespective of the age or relevance of the convictions to the role applied for, was held to be incompatible with article 8 of the European Convention on Human Rights.

⁴ Section 113B(4) of the Police Act 1997 allows the police to disclose information on an enhanced criminal record certificate which is considered relevant by the chief of any police force which has direct knowledge of the applicant. See para 2.30 of our report.

⁵ AccessNI internal statistics.

⁶ *Re Gallagher's Application for Judicial review* [2016] NICA 42.

⁷ *Re Gallagher's Application for Judicial review* [2016] NIQB 43.

SCOTLAND

- B.11 Disclosure in Scotland is governed by the Rehabilitation of Offenders Act 1974, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007.⁸ Scotland also operates a filtering regime, in relation to what the Scottish system refers to as “higher level disclosures” (for Standard disclosure, Enhanced disclosure and PVG Scheme records).⁹ The disclosure of criminal records certificates, and filtering, in Scotland is undertaken by Disclosure Scotland.¹⁰
- B.12 Each spent conviction is considered separately and treated as though it was the only conviction. There are no blanket rules regarding the disclosure of multiple convictions. This is a major difference between the Scottish system and that in England and Wales. When asked about the differences between the Scottish system and that in England and Wales, Nigel Graham (policy adviser, criminal law and sentencing, Scottish Government) stated:

There are complications because we have drawn what we think is a proportionate line in the sand whereas England and Wales have taken a slightly different approach and said that, if someone is convicted more than once, they can forget about protection; it does not matter what or how serious the second conviction is.

- B.13 Where a conviction is spent under the Rehabilitation of Offenders Act 1974, and a higher level of disclosure is required in the circumstances (because the person requesting the certificate is applying for a specific role or licence), then disclosure of a spent conviction is determined in the following stages:

- (1) Consider the type of offence committed: If the spent conviction is for an offence on the “list of offences that must always be disclosed” (“the always list”),¹¹ Disclosure Scotland will always disclose it regardless of any other factors such as how long has passed since conviction or the age of the individual at the time of conviction. If the spent conviction is for an offence on the “list of offences which are to be disclosed subject to rules” (“the rules list”)¹², Disclosure Scotland will disclose it in certain circumstances.

⁸ These Acts were amended by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 and the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015 respectively.

⁹ “Protecting Vulnerable Groups Scheme Membership contains all unspent conviction information, including unspent cautions and relevant spent convictions, and any other non-conviction information reasonably believed to be relevant by the police or other Government bodies.” See: <https://www.disclosureScotland.co.uk/disclosureinformation/index.htm> (last visited 27 January 2017).

¹⁰ Disclosure Scotland is an Executive Agency of the Scottish Government.

¹¹ Police Act 1997 sch 8A (inserted by s 3 of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015). The full list is available at: <https://www.mygov.scot/offences-always-disclosed/uksc-offences-always-disclosed-list-2015.pdf?inline=true> (last visited 27 January 2017).

¹² The full list is available at: <https://www.mygov.scot/offences-disclosed-rules/uksc-offences-disclosed-rules-list-2015.pdf?inline=true> (last visited 27 January 2017).

See paragraph B.15 below for how the determination of which list an offence should appear on is made. The two lists of offences are applied in exactly the same way to all types of higher level disclosure: there is no differentiation between types of profession or role.¹³ If the spent conviction is for an offence that does not appear on either of the lists, Disclosure Scotland will not disclose it.

- (2) Consider the passage of time since the conviction: If a spent conviction is not for an offence on the always list but is for an offence on the rules list then, as noted, Disclosure Scotland will disclose it in certain circumstances. In the first place, whether the spent conviction is disclosed depends on both: the age of the individual at the time of conviction; and the passage of time since the date of conviction.
 - (a) If the individual was over 18 when convicted and the conviction occurred over 15 years ago, the conviction will not be disclosed.
 - (b) If the individual was under 18 when convicted, and the conviction occurred over 7.5 years ago, the conviction will not be disclosed.

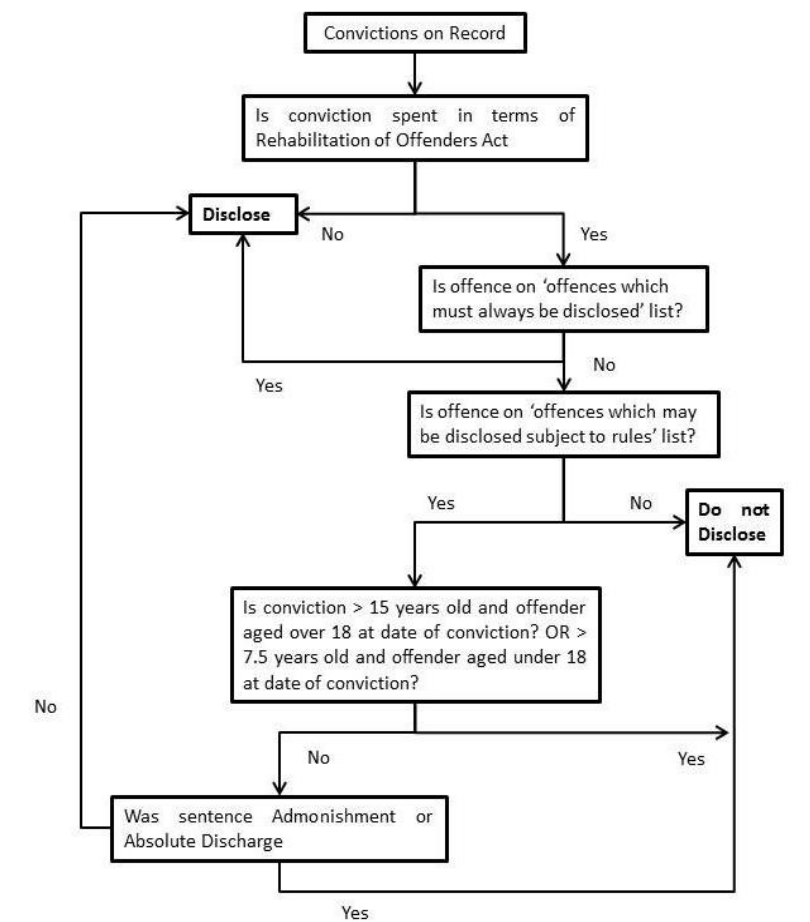
Once the indicated period of time has passed the conviction becomes “protected”. The period of time that must pass before protection applies is discussed further below at B.20.

- (3) Consider the disposal for the offence: If the individual has a spent conviction for an offence on the rules list, which falls to be disclosed under the rules on passage of time, but that conviction resulted in a sentence of admonition¹⁴ or absolute discharge, then the conviction will not be disclosed regardless of how long ago that individual was convicted.¹⁵

¹³ The reasoning behind this can be found in Scottish Government, *Policy Note: The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015* (September 2014), para 19.

¹⁴ An offender is found guilty, but is given a verbal warning rather than a fine or other sentence.

¹⁵ Note, cautions do not exist in Scotland.



Flowchart from:

<https://www.disclosurescotland.co.uk/news/images/ConvictionsonaRecord.jpg>

(last visited 27 January 2017).

- (4) Review (see B.20): Where a spent conviction for an offence is on the rules list, which falls to be disclosed under the rules and which was not disposed of by way of admonishment or absolute discharge, then the individual has a right to apply to a sheriff to have that conviction removed from their certificate. This process is explained in detail below.

The development of the “always” list and the “rules” list

Criteria for the “always” list

- B.14 In determining which offences should be on the two lists, consideration was given to the nature of the positions for which higher level disclosure is required. The common attribute of these roles was deemed to be the placing of the individual in “a position of power and responsibility”. It is explained in the policy note accompanying the 2015 Remedial Order that:

A conviction for a criminal offence that:

- resulted in serious harm to a person;
- represented a significant breach of trust and/or responsibility;

- demonstrated exploitative or coercive behaviour;
- demonstrated dishonesty against an individual;
- abused a position of trust; or,
- displayed a degree of recklessness that resulted in harm or a substantial risk of harm

is evidence that a person's conduct has caused harm to an individual and/or is evidence of misconduct in a position of authority. This evidence of past behaviour is important information for employers when determining whether an individual is suitable for a role for which higher level disclosure is applicable.¹⁶

The classification of offences

- B.15 When asked how the “dividing line” in distinguishing between offences had been drawn, Angela Constance (then Cabinet Secretary for Education and Lifelong Learning at the Scottish Government) stated:

We have looked at the classification of crimes and offences, at every type of offence recorded in the children's hearings system and the police national computer, at the disclosure and barring service, and at AccessNI, Northern Ireland's filtering system ... We are looking at offences that have resulted in serious harm to a person or a significant breach of trust and responsibility; that have demonstrated exploitative or coercive behaviour or dishonesty against an individual; and in which people have abused a position of trust or displayed a degree of recklessness. That is why we have two lists of things that either will be disclosed or may be disclosed. Our thinking is informed by those factors, all of which are potentially of relevance to the offences on both lists.¹⁷

- B.16 A Scottish Government policy note¹⁸ also lists the following sources of information:

- (1) the Scottish Government published Recorded Crime in Scotland Classification of Crimes and Offences;
- (2) all Scottish Criminal History System (“CHS”) and PNC recorded offences that have appeared on higher level disclosures since 2007;
- (3) the DBS list of offences that will never be filtered from a DBS certificate;
- (4) Access Northern Ireland's filtering list; and

¹⁶ Scottish Government, *Policy Note: The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015* (September 2014), para 15.

¹⁷ Scottish Parliament, Delegated Powers and Law Reform Committee, Tuesday 8 September 2015, at 44.

¹⁸ Scottish Government, *Policy Note: The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015* (September 2014), para 20.

- (5) the detailed ISCJIS (Integration of Scottish Criminal Justice Information Systems) charge codes published on the Scottish Government website.
- B.17 The “always” list and the “rules” list are kept up to date by the Disclosure Scotland Policy Unit, with support from the Scottish Government Legal Department. Police Scotland provide to Disclosure Scotland a spreadsheet of new offences and charge codes each month, which are classified according to the criteria. New charge codes may also be identified by the vetting department in Disclosure Scotland whilst they are handling cases. These are forwarded to the Policy Unit to classify.

“Superseded”

- B.18 The Scottish provisions also make provision for the inclusion of historical offences in the lists, in a way that very similar to the provisions made in England and Wales in relation to the list of non-filterable offences. The Scottish legislation refers to “superseded” offences in the same way.

An offence superseded (whether directly or indirectly) by any offence listed in paragraphs 1 to 61 of this schedule (and any qualification in relation to a listed offence applies to the superseded offence as it applies to the listed offence).¹⁹

Disclosure periods

- B.19 The time periods which must pass before a conviction becomes protected (see paragraph B.14(2)(b) above) were considered “unnecessarily long and disproportionate” by many respondents to the consultation on the Remedial Order 2015. In answer to how these periods were justified and how they had been arrived at, the Scottish Government stated:

The Scottish Government believes it has struck the right balance between public protection and an individual’s right to a private life. The disclosure periods of 15 and 7.5 years have been derived within the context of current rehabilitation periods under the 1974 Act and the period of time that Police Scotland keep records of convictions on the Scottish Criminal History System. Scottish Ministers will, however, keep this under review. The Scottish Government believes that there is no increase in the risk to vulnerable adults and children by ending the practice of disclosing very old and/or minor spent convictions. The disclosure of relevant conviction information only should make employer’s recruitment decisions easier.²⁰

¹⁹ Police Act 1997, sch 8A para 62 (as inserted by inserted by s 3 of the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015).

²⁰ Scottish Government, *Statement of the Scottish Ministers Summarising Written Observations on and Modifications to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015*, p 12 available at <https://consult.scotland.gov.uk/disclosure-scotland/protection-of-vulnerable-groups/results/uksc----remedial-order-2015----statement-of-written-observations----final-version.docx> (last visited 4 August 2016).

The review process

- B.20 The applicant must notify Disclosure Scotland of his or her intention to make an application for review within 10 working days. Where an applicant applies for review the disclosure certificate will be issued only to the applicant, rather than to the counter-signatory and the applicant at the same time (as would happen had the conviction not fallen to be disclosed under the rules).
- B.21 The actual application for review must be made to the sheriff within three months of the notification to Disclosure Scotland. The sheriff will then consider if the spent conviction is relevant to the purposes for which the disclosure was requested. In reviewing whether the conviction should become protected, the sheriff must consider whether the conviction is “relevant to the purpose for which the certificate was required”.²¹ If the sheriff orders that the spent conviction should be removed, disclosure Scotland will remove the conviction and then issue a new certificate.
- B.22 The Scottish Government’s reasoning behind the review process, as discussed at the Delegated Powers and Law Reform Committee, was to make “possible for account to be taken especially of unusual circumstances or particular background factors that mean that, in a particular instance, the general policy rules should not apply in the ‘may or may not disclose’ rules list of offences”.²²

FRANCE

- B.23 The French disclosure regime is controlled by the Casier Judiciaire National, or the “National Criminal Record”. There are three types of disclosure certificates in France which contain different amounts of information.²³ There are four ways in which convictions may be removed from an individual’s criminal record.

National criminal record disclosure certificates

- B.24 The table below gives an overview of the three certificates, which are known as “bulletins”:²⁴

²¹ Section 116ZB(6).

²² The Scottish Parliament, Delegated Powers and Law Reform Committee, 8 September 2015, Gerry Hart (Disclosure Scotland) at 48.

²³ Articles 768 to 781 Code de procédure pénale (Criminal Procedure Rules).

²⁴ Translated from the French Ministry of Justice website: <https://www.service-public.fr/particuliers/vosdroits/F14710>, accessed 31 January 2017.

A criminal record includes convictions and decisions about a person including:

- convictions by criminal courts;
- some decisions made by the commercial courts (winding up, personal bankruptcy, bans from directorship);
- some administrative and disciplinary decisions;
- judgments ordering deprivation of parental rights or removal of all or part of the rights attached thereto;
- expulsion orders issued against foreigners;
- declarations of lack of criminal responsibility due to a mental disorder; and
- convictions by foreign courts against a French national.

It also includes statements such as penalties or punishment imposed after adjournments, pardons, commutations or reduced sentences, conditional discharges, and revocation of suspended sentences. The date of the expiration of sentences and the payment of fines is mentioned in criminal records.

Bulletin 1

Bulletin 1 includes all convictions and decisions. The following are, however, not included on Bulletin 1:

Immediate exclusion:

- convictions subject to an amnesty;
- convictions subject to judicial rehabilitation;
- declarations of a lack of criminal responsibility after a hospital or detention order has expired;
- commercial or disciplinary sanctions erased by rehabilitation; and
- foreign convictions after withdrawal has been ordered by a court.

After three years:

- convictions for petty offences (the period is 4 years, however, for “delicts”);
- assorted declarations of guilt which did not carry a penalty, unless a court has ordered that they should not be included in the first place;
- educational measures or sanctions, unless new measures or convictions were imposed in that period; and
- settlements, unless another settlement or criminal conviction has been recorded during that period.

After five years:

- judgments ordering winding up; and
- personal bankruptcy or directorship prohibitions, unless their duration is for longer than five years.

Bulletin 1 requests can only be made by judicial authorities, and prisons acting within their competence.

Bulletin 2

Bulletin 2 includes most convictions for “crimes”, except:

- convictions subject to judicial rehabilitation or operation of law;
- convictions imposed on minors;
- convictions for petty offences; and
- suspended sentences, so long as the trial period has ended without a decision ordering its activation, unless it was pronounced following social and legal supervision or a sentence of disqualification from a professional or volunteering activity involving regular and lengthy contact with minors.

Bulletin 2 also has convictions by foreign courts against French nationals, with the exception of minors' convictions. This bulletin may only be issued to certain administrative authorities or organisations for specific reasons (e.g. access to certain professions or receiving an honour).

Bulletin 3

Bulletin 3 contains the most serious convictions and custodial sentences of law:

- convictions for “crimes” and “delicts” which carried more than 2 years' imprisonment without parole;
- convictions for “crimes” and “delicts” which carried less than 2 years' imprisonment where the court ordered there should be no parole;
- certain disqualifications or bans still in force;
- social and judicial supervision measures, and disqualifications from professional or voluntary activities involving regular contact with minors; and
- convictions by foreign courts against French nationals involving more than 2 years' imprisonment.

This bulletin may only be issued to the person concerned, or his legal representative if he is a minor or an adult under guardianship. It cannot be issued to a third party.

B.25 The certificates are issued for the following purposes:

- (1) Bulletin 1: highly restricted, issued only to judges, courts and prisons. When a new court case begins, the Bulletin 1 record is brought to the attention of those involved.
- (2) Bulletin 2: may only be requested by an employer. They are used for jobs such as teachers, social workers and solicitors, and most often requested by the public sector.
- (3) Bulletin 3: may only be requested by the individual concerned. Employers may request that that individual provides a copy of their Bulletin 3.²⁵

Removal of offences from the record

B.26 Two of the ways in which convictions may be removed from an individual's criminal record involve automatic expungement. The other two methods require some demonstration of merit.

- (1) "Data management" (automatic). Examples of data management measures, which remove criminal records entirely, include:
 - (a) the "120 years" rule, whereby files relating to individuals who attain 120 years of age are deleted;²⁶ and
 - (b) the "40 years rule", whereby files which are not otherwise deleted are deleted if there is a clear 40 year period where no convictions have been passed against an individual.²⁷
- (2) "Legal rehabilitation" (automatic). This is used for petty offences and "delicts". It does not apply to "crimes" (the most serious of the three classes of offences in France). Specific time periods must elapse, without any further criminal convictions being acquired during the period, for legal rehabilitation to take place. Once someone is "legally rehabilitated", any relevant offences do not appear on Bulletin 2 or Bulletin 3 certificates. The regime for Bulletin 1 certificates differs (see the table above). The relevant time periods depend on the sentence received for the crime, as follows:
 - (a) a fine – three years;
 - (b) up to one year's imprisonment – five years from end of sentence;
 - (c) up to 10 years' imprisonment – 10 years from end of sentence; and

²⁵ Stacey, C., (2015), *Rehabilitation & Desistance vs Disclosure, Criminal Records: Learning from Europe*. <http://www.unlock.org.uk/wp-content/uploads/Rehabilitation-Desistance-vs-Disclosure-Christopher-Stacey-WCMT-report-final.pdf>. Accessed 27 January 2017.

²⁶ Décret n° 2014-1422 du 28 novembre 2014.

²⁷ Article 769 Code de procédure pénale.

(d) multiple prison sentences, the total of which does not exceed five years – 10 years from end of sentence.²⁸

- (3) “Clearing” of a Bulletin 2 or a Bulletin 3 (merit required). An application must be made to either a “juge de l’application des peines” (judge responsible for implementing sentences) or to a court which sentences those who commit “delicts”, to clear a Bulletin 2 or Bulletin 3 certificate of a specific crime or delict. Sexual offences cannot be cleared.²⁹

The aim of “clearing” is to promote rehabilitation and employment. Individuals can ask for this measure immediately after sentence, with the effect that the conviction never appears in a Bulletin 2 or Bulletin 3 certificate.

- (4) “Judicial rehabilitation” (merit required). This measure applies to all types of offences, including “crimes”. It does not apply in respect of certain offences which may appear on a criminal record: an application for judicial rehabilitation is a complete “wiping of the slate”, and the offender’s entire criminal history is erased. In order to be eligible for judicial rehabilitation, the person must have stopped committing crime and effectively become a model citizen.³⁰

An offender may apply for judicial rehabilitation after the following time periods:

- (a) Delict: three years (six years if any re-offending has occurred).
(b) Crime: five years (10 years if any re-offending has occurred).

The procedure involves an application to the district prosecutor, who seeks the opinion of the post-sentencing judge, and has been described in the following way:

²⁸ Danet J., Grunvald S., Herzog-Evans M., Legal Y., (2008), *Prescription, amnistie et grâce en France*, Dalloz, Paris.

²⁹ Articles 775-1 and 706-47, Code de procédure pénale.

³⁰ Article 787-4 Code de procédure pénale.

The district prosecutor obtains various official documents, and sends these, with his opinion, to the prosecutor general, who submits the case to the court which is competent for judicial rehabilitation; it's part of the Court of Appeal... The court must give its ruling within two months, with the applicant and/or his advocate being summoned. The court holds an adversarial debate, where the individual can either choose to present his case alone, or be assisted by a solicitor... The police investigate the evidence that is presented; there is also a discrete investigation in the community. The hearing and the decision are held *in camera*... because of the serious repercussions the individual might face if their criminal record is made public.³¹

If the application is rejected, another application can be made after two years. If it is granted, convictions on Bulletins 2 and 3 are permanently deleted. The court can direct that Bulletin 1 is also treated in the same way.³²

THE NETHERLANDS

- B.27 Dutch law generally prohibits the provision of written information about criminal records. This is to prevent employers, or prospective employers, from requiring applicants to provide a copy of their criminal record.

Judicial Documentation Data

- B.28 An individual must apply to the Board of Procurators General to access their own "Judicial Documentation Data" and will be informed orally about what is included in that documentation. Judicial Documentation Data can also be accessed by categories of officials, but only for a specified purpose and/or in specific circumstances.³³
- (1) Court officials in the Netherlands, Aruba and the Netherlands Antilles for use in court proceedings, or to the Minister of Justice for use in court proceedings or for granting a pardon.
 - (2) The Office of the Public Prosecutor for enforcing sentences.
 - (3) Individuals and agencies, who already have access to criminal procedure data, where there is an important public interest in them also accessing Judicial Documentation Data (for example, police or prison officers).³⁴

³¹ Danet J., Grunvald S., Herzog-Evans M., Legal Y., (2008), *Prescription, amnistie et grâce en France*, Dalloz, Paris.

³² Article 798-2 Code de procédure pénale.

³³ See article 8, Wet justitiële en strafvorderlijke gegevens (Judicial and Criminal Procedure Data Act).

³⁴ Article 39e, Wet justitiële en strafvorderlijke gegevens.

- (4) Individuals and agencies who are not involved with criminal procedure where they are serving a public function and it would be in the public interest (e.g. those dealing with recruitment into the police, prisons, and security), but:
- (a) the data must be necessary for the proper execution of public duties;
 - (b) the data cannot generally be stored by these individuals or agencies;
 - (c) only information about final, non-appealable convictions in the previous eight years, for which sentences were enforced, can be provided (although if and when a prison sentence has been enforced, the length of the prison sentence is added to the eight year period); and
 - (d) the information in (c) above can only be provided if the offender was 16 or over at the date of the offence,³⁵ and only if they were sentenced to specific punishments.³⁶

Conduct certificates

- B.29 As private employers cannot see criminal records, the Netherlands issues “Conduct Certificates” which applicants can show to prospective employers. The Certificates include a statement to say that there are no objections to the applicant practising a certain profession or performing a certain role. The Certificates are issued by the Minister of Justice, who assesses whether a Certificate should be issued on objective and subjective criteria.³⁷
- B.30 The objective assessment criteria include questions such as “What would the effects be if the act in question was repeated?” and “Is the applicant a risk to society?” Risk is assessed differently depending on the applicant’s desired role or profession. Any previous offences are also assessed according to whether they are an obstacle to the proper performance of a task or activity. For example, if a request is submitted for a Conduct Certificate for a task or activity in a “relation of dependence” (for example, caring or teaching) and there is Judicial Data on sexual offences, a Conduct Certificate is unlikely to be issued.
- B.31 The subjective criteria include the way in which any previous cases were settled (including the nature and length of any sentence), the amount of time since the conviction and the number of previous convictions. Other factors which can be considered include the age and marital state of the individual requesting the Conduct Certificate, his or her age at the time of the offence, and whether or not the offence is likely to be repeated. The circumstances in which any previous offences were committed are not to be considered.

³⁵ Article 12, Wet justitiële en strafvorderlijke gegevens.

³⁶ Boone, M., *Judicial Rehabilitation in the Netherlands: Balancing between safety and privacy*, European Journal of Probation, 2011, Vol. 3(1): 63-78.

³⁷ These come from the 2008 Conduct Certificate Policy Regulations.

B.32 Generally, an applicant's criminal record for the previous four years is observed when a Conduct Certificate is sought. If their record is clear, a Certificate is usually issued. If Judicial Data appear during the four year period, all data for the past 20 years will then be assessed to decide whether a Certificate can be issued. There are three exceptions to these rules:

- (1) If certain sexual offences have ever been committed by an individual, then their entire record can be examined, not just the past 20 years.
- (2) Certain jobs or roles require a longer initial observation period. For example, if a Certificate is sought for firearms purposes, the observation period is eight years. It is five years for taxi and lorry drivers.
- (3) If the applicant has not committed any offences in the initial observation period, but issuing a Conduct Certificate would be "irresponsible" given the position it is requested for, it will still be refused. This only happens where, during the 20 year retrospective period, offences punishable by a maximum sentence of at least twelve years were committed, and the applicant was subject to a prison sentence or hospital order.

B.33 There is a project in the Netherlands called "HALT", by which young offenders are offered up to 20 hours of community service if they are caught committing an offence. Completing the use of community service prevents the offence from being put onto an individual's criminal record, but the offence will be included in police records and will be relevant to whether a Conduct Certificate can be issued. Unlike France, there is no developed system of "rehabilitating" ex-offenders by removing offences from their criminal records if the ex-offender shows merit.

Removal of offences from the record

B.34 The current system of expunging convictions from criminal record certificates is, according to Boone,³⁸ as follows:

- (1) Judicial data on minor offences is stored until five years after the case has been irrevocable settled, i.e. the conviction is no longer appealable. The "storage period" is 10 years if a prison sentence or community sentence was imposed after a minor offence.
- (2) Judicial data on other criminal offences are kept for a thirty year "storage period" after the criminal sentence has become irrevocable.³⁹
- (3) If a non-suspended prison sentence, youth detention or a hospital order of more than three years is enforced, this time is added to the length of the "storage period."
- (4) 10 years is added on to the "storage period" if the crime is penalized by a maximum prison sentence of eight years or more.

³⁸ See footnote 36 above.

³⁹ Judicial and Criminal Procedure Data Act, Section 4 Part 1.

- (5) The “80 years rule” generally allows for all data to be removed 80 years after the birth of an offender (as they will probably not re-offend at this age).
- (6) However, data on sexual offences is not removed until 20 years after the death of the individual in question.

GERMANY

- B.35 Germany’s system of disclosure of criminal records is similar to the system in the Netherlands, in that there is restricted access to criminal records and a system of “certificates of conduct” for employers. Criminal record certificates are not issued as part of job applications for the same reason as in the Netherlands (they may impede the employment of ex-offenders). If an individual wishes to see his own criminal record, then he may do so only in a court room, and alone. Making notes or copies is forbidden.⁴⁰ “Certificates of conduct” are also available.
- B.36 The only purposes for which unrestricted access to criminal records is permitted are use in the criminal justice system, administrative reasons and research.⁴¹ Offences can be removed from an individual’s record in certain circumstances.

Certificates of conduct

- B.37 Unlike in the Netherlands, certificates of conduct can include some details of previous criminal convictions. There are two types of certificates of conduct in Germany:⁴²
- (1) Certificates of conduct for public employers and licensing authorities. These must be requested by the individual concerned, but they are sent directly to the public authority who is the prospective employer.
 - (2) Certificates of conduct for private employers. Prospective private employers are only permitted to ask about convictions which are “directly relevant” to the job applied for. Employment courts have interpreted the phrase “directly relevant” narrowly: often, employers are not permitted to see the certificate of conduct at all, as it could reveal irrelevant convictions.

In 2009, an “extended certificate of conduct” was introduced for any prospective employees who are going to work with children or dependent adults.⁴³ This certificate includes all convictions for sexual offences. Prospective employers in these professions can demand to see an extended certificate.

⁴⁰ Art. 42 Bundeszentralregistergesetz.

⁴¹ Art. 41 Bundeszentralregistergesetz.

⁴² Morgenstern, C., *Judicial rehabilitation in Germany – the use of criminal records and the removal of recorded convictions*, European Journal of Probation, 2011, Vol. 3(1): 20-35

⁴³ Art. 30a Bundeszentralregistergesetz.

Removal of offences from the record

B.38 As in France, there are four ways in which convictions may be removed from an individual's criminal record in Germany. Two of these methods involve automatic expungement. The other two methods require some demonstration of merit.

- (1) "No further inclusion in a certificate of conduct" (automatic). This applies to offences after certain time periods have passed. It does not apply where life imprisonment has been imposed, and after 15 years no parole nor pardon has been granted. It also does not apply when preventive detention or certain hospital orders have been ordered. The time periods begin on the day of the final judgment in any case. They are extended by the length of the prison sentence. The periods are as follows:
 - (a) three years after convictions for offences that are punished with a suspended sentence of less than one year;
 - (b) five years for most other convictions; and
 - (c) 10 years for convictions for sexual offences with a punishment of more than one year's imprisonment⁴⁴
- (2) "Redemption of convictions" (automatic). Criminal convictions will no longer appear in a certificate of conduct, and will no longer be able to be used in any legal matter against an ex-offender, after the following time periods have passed:
 - (a) five years for all convictions that resulted in less than 90 day "fine units", imprisonment of less than three months or, for juveniles, less than one year (or two, if suspended);
 - (b) 10 years for all other juvenile convictions, or for adult convictions that resulted in less than one year's imprisonment;
 - (c) 15 years in most other cases;
 - (d) 20 years for sexual offences that resulted in more than one year of imprisonment.⁴⁵

⁴⁴ Art. 34 Bundeszentralregistergesetz.

⁴⁵ See footnote 42 above.

- (3) “Application for early review” (some merit required). Ex-offenders can apply for early review of the inclusion of a conviction on a certificate of conduct,⁴⁶ or for early deletion of a conviction from their criminal record.⁴⁷ These measures are rarely used. The first may be used when a foreign offender’s conviction is added to the record, but the equivalent German offence is too harsh and this may impinge employment prospects. The second may be used where the offender has paid full and speedy compensation to the victim.⁴⁸

The Federal Office of Justice – the agency responsible for administering the registry of criminal records – can grant these requests for early review with or without a hearing in a court or before a relevant public authority. Unlike in France, the applicant is not “heard” and does not present arguments regarding their rehabilitation. The Federal Office will, however, take into account whether the continued inclusion of the conviction would cause additional disadvantage, and whether the offender has engaged with any restorative justice initiatives.

- (4) “Youth rehabilitation rituals” (merit required). Juveniles and young offenders aged under 21, also have the opportunity to “eliminate the penal blemish” through a ritual not available to adult offenders.⁴⁹ When a juvenile judge considers that the juvenile offender has proved themselves since their offending to be an “integrated”, “worthy” and “righteous person” with “impeccable conduct”, a juvenile court can make a declaration of rehabilitation,. It is usually done two years after a sentence has been enforced, but is not available for specified sexual offences.⁵⁰

B.39 Germany also has the following three overarching automatic rules on the removal of offences from criminal records:

- (1) “Three years rule”: all entries are removed from the register three years after the official notification of the death of a person;
- (2) “90 years rule”: all entries are removed from the register 90 years after a person’s date of birth;
- (3) Entries that relate to the fact that a person was not convicted because he/she is not criminally responsible due to a mental disorder are removed after 10 years (or 20 years for felonies).⁵¹

⁴⁶ Art. 39 Bundeszentralregistergesetz.

⁴⁷ Art. 49 Bundeszentralregistergesetz.

⁴⁸ Götz/Tolzmann, Kommentar zum Bundeszentralregistergesetz (2000), Art. 39 and Art. 49.

⁴⁹ “Beseitigung des Strafmakels”, see footnote 32 above.

⁵⁰ Art 97 Jugendgerichtsgesetz.

⁵¹ Above at footnote 42.

SPAIN

- B.40 Spain separates “police records” from “criminal records”.⁵² Criminal records only include non-appealable, final convictions: the National Conviction Register (“NCR”) does not record cautions, reprimands, warnings or barrings.⁵³ There are two ways in which offences can be removed from an individual’s criminal record.

Criminal record certificates

- B.41 Only the individual concerned, the police, prosecutors and judges can request criminal records directly from the NCR. Generally, employers are not permitted to request details from the NCR; instead they ask prospective employees to present their individual criminal record certificate.
- B.42 Employers in certain “specified professions” are required to ask their prospective employees for a criminal record certificate, such as those hiring lawyers, issuing taxi licences, the police or the military. Some of these employers are permitted to request criminal record details directly from the NCR. According to Stacey, outside of the specified professions requesting the presentation of criminal record certificates is “very unlikely” in many sectors. He states that many roles (including teachers) merely ask applicants to state that they have never been sentenced to a professional disqualification.⁵⁴

Removal of offences from the record

- B.43 There is a right to “cancellation” of criminal records in Spain, which can be sought in two ways. Neither route to cancellation is automatic.
- (1) The first route requires ex-offenders to apply to the Ministry of Justice. In order to be eligible to apply, an ex-offender must have avoided re-offending, paid any civil compensation, and waited for the appropriate rehabilitation period to pass:
- (a) six months for minor offences;
 - (b) two years for offences resulting in less than 12 months’ imprisonment;
 - (c) three years for other less serious offences which resulted in less than three years’ imprisonment;
 - (d) five years for other less serious offences which resulted in three or more years’ imprisonment;
 - (e) 10 years for serious offences.⁵⁵

⁵² Police records on suspects are held separately from records relating to criminal convictions and other court disposals.

⁵³ Above at footnote 25.

⁵⁴ Above at footnote 25.

⁵⁵ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, Art. 136.

- (2) The second route to cancellation is where the NCR decides to cancel offences itself. This process can be started by the NCR of its own accord, or at the request of the ex-offender. Once cancellation takes place, any criminal record certificate will appear empty (although the full record will still be available to judges and courts).

SWEDEN

- B.44 In Sweden it is mandatory to undertake a criminal records check on prospective employees within certain professions. What can be disclosed on the criminal record depends on which profession an applicant wishes to enter. For example, there are different levels of disclosure for teachers, carers for disabled children, and insurance intermediaries. Those who work with children outside of state-funded activities where the state has a special responsibility may be asked to hand in their own criminal record certificate.⁵⁶
- B.45 Expunging convictions from a criminal record is referred to as “weeding”.

Subject access certificates

- B.46 Individuals may request their own criminal record certificates through “subject access”. Subject access certificates disclose all of the information on an individual’s record. However, employers can force prospective employees to request their criminal record certificate using subject access rights, and then demand that they hand it over. In 1995, approximately 10,000 “forced” checks of this type were carried out. In 2011 more than 177,000 forced checks occurred.⁵⁷ According to Stacey:

to battle against this, the ‘[subject] access’ results come in two sections – the first section (i.e. the front page) gives information about the national criminal records registry, and explaining the nature of this type of request, i.e. stating that it shouldn’t be used for employment purposes. The results then appear on further pages. The authorities had clearly anticipated potential abuses of this system, as they also don’t number the pages, allowing an individual to provide just the front page. However, some employer practice has since adapted to this by requiring individuals to provide the response in an unopened envelope, to ensure that nothing could be removed.⁵⁸

- B.47 Since 2009 there have been two attempts to reform the criminal records disclosure system to prevent forced checks. Neither has produced results.

⁵⁶ 2011/92 EU, 13 December 2011.

⁵⁷ Backman, C. (2012), *Mandatory Criminal Record Checks in Sweden: Scandals and Function Creep*, Surveillance & Society, Vol. 10, No 3/4

⁵⁸ See footnote 25 above.

Removing offences from the record

- B.48 As soon as a conviction is “weeded”, it is not disclosed on any document which could be provided to employers (although a private database, Lexbase, which allows users to download details of anyone’s criminal record for a fee, may eventually challenge this position).⁵⁹
- B.49 Entries remain on a criminal record for as long as the “weeding” of any other entry has not occurred (with the exception that future fines do not impact on the “weeding” time of earlier sentences).⁶⁰
- B.50 In his article *Rehabilitation & Desistance vs Disclosure*, Stacey provides the following table which shows the “weeding periods”, the length of time that must elapse before an entry on a criminal record can be removed.⁶¹

Sentence	Length of time before ‘weeding’ applies
Waiver of prosecution, under 18 years of age	Three years after the decision
<ul style="list-style-type: none"> • Fines specified to a maximum amount • Suspended sentence or probation (if under 18 at the time) • Day fines 	Five years after the judgment, decision or acceptance
Conversion sentences for fines	Ten years after the sentence has been enforced
<ul style="list-style-type: none"> • Suspended sentence • Probation • Community service 	Ten years after the judgment or decision
Imprisonment	Ten years after the sentence has been enforced ⁶²

⁵⁹ See footnote 25 above.

⁶⁰ The weeding time periods appear in the Swedish Criminal Records Act 1998.

⁶¹ See footnote 25 above.

⁶² The weeding time periods appear in the Swedish Criminal Records Act 1998.