

Criminal record and barring checks

July 2013

About the NHS Employment Check Standards

This document outlines the criminal record and barring checks that NHS organisations (across England) are required to undertake in the appointment and ongoing employment of individuals in eligible positions in the NHS. It is one of a set of six documents that make up the NHS Employment Check Standards.

The NHS Employers organisation has developed these standards with the Department of Health and employers in the NHS. The standards, last updated in July 2013 include those that are required by law, those that are determined by Department of Health (DH) policy in relation to compliance with the Government's core standards outlined within the Standards for Better Health, and those required for access to the NHS Summary Care Record (SCR).

All NHS providers are required to be registered with the Care Quality Commission (CQC) and, as part of this registration are required to comply with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 and the Care Quality Commission (Registration) Regulations 2009. The CQC's Essential Standards of Quality and Safety outline 16 core standards which must be met, including having robust recruitment practices in place (Outcome 12 *Requirements relating to workers*, specifically refers). NHS providers should therefore provide evidence of compliance with the NHS Employment Check Standards as part of the CQC's annual regulatory framework.

Failure to comply with these standards could potentially put the safety and even the lives of patients, staff and the public at risk.

The NHS Employment Check standards apply to all applications for NHS positions (prospective employees) and staff in ongoing NHS employment. This includes permanent staff, staff on fixed-term contracts, volunteers, students, trainees, contractors, highly mobile staff, temporary workers (including locum doctors), those working on a trust bank, and other workers supplied by an agency. Trusts using agency, contractor or other external bodies to provide services must ensure, through regular audit and monitoring, that their providers comply with these standards.

Avoiding discrimination

Under the Equality Act 2010, employers must not unlawfully discriminate in their recruitment processes on the grounds of ethnicity, disability, age, gender or gender re-assignment, religion or belief, sexual orientation, pregnancy or maternity, marriage or civil partnership. These categories are known in the Act as 'protected characteristics'. To avoid discrimination, employers must treat all job applicants in the same way at each stage of their recruitment process.

Recording and protecting data

NHS employers must carry out all checks in compliance with the Data Protection Act 1998. Information should only be obtained where absolutely essential to the recruitment decision and key in accordance with the Act. Employers must record the outcome of all checks undertaken, using the Electronic Staff Record (ESR), where available, or an alternative HR management system. These checks form part of the information governance and assurance standards linked to the use of the NHS Summary Care Record (NHS SCR). For more details, visit the Health and Social Care Information Centre: <http://systems.hscic.gov.uk>

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Introduction

Criminal record and barring checks are designed to help prevent unsuitable people from entering the NHS workforce and gaining access to vulnerable groups.

A criminal record check relates to the data held about an individual's criminal history. The information included in a criminal record check varies between countries, and even between jurisdictions within the same country. In the majority of cases a check will include all criminal offences (including convictions, cautions, reprimands and warnings). It may also include traffic offences such as speeding and drink-driving. In some countries the record is limited to actual convictions issued by a court of law, while others will include arrests, charges, charges dismissed, charges pending and even charges of which the individual has been acquitted.

This document specifically focuses on:

- providing clarity on the legislation which permits employers to obtain criminal record checks
- where checks can be obtained from and how
- eligibility for different levels of checks
- filtering rules which came into force from May 2013
- the application and portability of disclosure information provided by the Disclosure and Barring Service (DBS)
- use of the Update Service
- the duties that an employer has to refer information to the DBS
- the handling and retention of information.

While important, a criminal record check is only one aspect of the recruitment and selection process. Employers must make decisions to appoint using the information gained as part of the wider range of checks outlined within the NHS Employment Check Standards, such as those which verify an individual's identity, obtaining and following up of employment history and references, right to work and professional registration and qualification checks. Only where employers take this holistic approach can they ensure effective and safe recruitment practices. The standards can be found at:

www.nhsemployers.org/RecruitmentAndRetention/EmploymentCheckStandards

Where can I request a criminal record check?

In the UK, criminal record checks should be obtained through the Disclosure and Barring Service (England and Wales), Disclosure Scotland (Scotland) and Access NI (Northern Ireland). This guidance specifically focuses on the criminal record checking requirements which apply to NHS positions in England.

Further information about how to obtain a criminal record check can be found on the following websites:

- Disclosure and Barring Service (England and Wales)
www.gov.uk/disclosure-and-barring-service
- Disclosure Scotland (Scotland) **www.disclosurescotland.co.uk**
- Access NI (Northern Ireland) **www.nidirect.gov.uk/access-ni**

All three agencies have access to the same type of data. Employers should always obtain checks using the appropriate service in their geographical area. However, where a check is being carried out through the DBS and the applicant has resided in Scotland within the last five years, the DBS will contact Disclosure Scotland who will then contact the Scottish police forces to check whether any data is held in their records. Similar arrangements exist to share relevant information in Northern Ireland.

Who can you request a DBS check for?

Not all individuals being appointed into positions within the NHS are eligible for criminal record or barring checks. Employers must be clear when they may legally obtain a check as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and, in certain circumstances, the Police Act 1997 (Criminal Records) Regulations 2002.

The need for a check and the level of check is determined by the activities and the type of access to patients they will have as part of a particular role.

Guidance on specific groups

GPs and general practice staff

All GPs applying to join a medical performers list under the Performers List Regulations have to provide an enhanced disclosure as part of their application. They are also required to make a declaration about any past convictions or disciplinary action when applying to join the List.

In addition, general practices also have a responsibility to ensure that they carry out appropriate criminal record checks on applicants for any position within their practice that qualifies for either an enhanced or standard level check. This should include health visitors, cleaners, nursing staff etc. This may also include front office reception staff.

Any requirement for a check and eligibility for the level of check (standard or enhanced) is dependent on the roles and responsibilities of the job.

Dentists and their practice staff

Dentists applying to join a dental performers list are required to provide an enhanced disclosure as part of their application. An exception to this has been provided under Regulation 29(2) of the NHS (Performers Lists) Regulations 2004 (as amended), which allows vocational dental practitioners to be included in the performers list immediately. A satisfactory criminal record certificate must be submitted within two months.

In addition, dental practices have a responsibility to ensure that they carry out appropriate criminal record checks on applicants for any position within their practice that qualifies for either an enhanced or standard level check. This should include dental nurses, dental technicians etc. This may also include front office reception staff. The requirement for a check and the level of check is dependent on the roles and responsibilities of the job.

From April 2013, NHS England took over responsibility from PCTs in relation to the management of the Performers Lists. This includes decisions to refuse admission onto a List, and the removal of a performer from a List where they have been convicted of an offence and been sentenced to more than six months imprisonment.

Students

DBS checks apply to all students who, as part of their professional qualification, are required to carry out a clinical placement and where they will undertake regulated activity.

DBS checks may be requested by a higher education institution (HEI) as part of its admissions procedure, where a clinical training placement has been arranged and the applicant has been provisionally accepted.

Many students will be required to move frequently to new placements during the course of their training programme. It is therefore recommended that they have a DBS check at the start of their training course, as opposed to each and every time they move to a new placement, and a fresh check undertaken when they take up their first employment in the NHS.

Where it is highly likely that students will have contact with both children and adults, checks against both barred lists should be undertaken from the outset to ensure that they are not required to have duplicate checks.

The NHS organisation should seek written assurance that the HEI has carried out an appropriate check at the correct level. Where this assurance cannot be provided, the employer should request a new check.

Where there is a delay in obtaining a criminal records check, students may take up their placement providing appropriate safeguards are put in place to supervise that individual until appropriate clearances have been given.

For those students who are starting their training on or after 17 June 2013, it is highly recommended that they are encouraged to subscribe to the new DBS Update Service as part of their application for a DBS check. Once subscribed employers can check to ensure the individual's criminal status hasn't changed. Employers must always see the individual's copy of the DBS disclosure certificate before undertaking an online check.

Work experience/placements

A minimum age limit for criminal record checks has been set in the Protection of Freedoms Act 2012. This means that employers must not apply for a criminal record check for individuals under the age of 16.

Students who are on work experience placements and are engaging in an activity with vulnerable groups will also not be required to have a DBS check on the basis that the roles they are undertaking will involve them observing or carrying out minor duties under the full supervision of someone who is in regulated activity.

Volunteers

Not all volunteers will be eligible for a DBS check. As with any other member of staff or worker, decisions to undertake a DBS check and the level of check required must be determined by the roles, responsibilities and the level of contact they will have with vulnerable groups.

If a volunteer requires a DBS check because of their roles and responsibilities while volunteering, you should consider whether the position satisfies certain criteria to qualify for a

free of charge disclosure. The definition of a 'volunteer' is outlined within the Police Act 1997 (Criminal Records) Regulations 2002 as:

"A person engaged in an activity which involves spending time, unpaid (except for travel and other approved out-of-pocket expenses), doing something which aims to benefit some third party other than or in addition to a close relative."

For the purpose of a DBS check, it is deemed that 'unpaid' means not in receipt of any payment (for example, remuneration, allowance, financial benefit, payment in kind, or other means of support) in relation to the activity. The applicant must therefore not:

- receive payment for activities (except for travel and other approved out-of-pocket expenses)
- be on a placement/work experience
- be on a course that requires them to do this job role
- be in a trainee position that will lead to a full-time role/qualification.

Employers may find it useful to refer to the criminal record and barring check decision tree at Appendix 1 which outlines the process for considering whether positions require a check.

How can I request a criminal record check?

Self-disclosure

Where it is deemed justifiable in terms of the position being offered, it is recommended that employers request that applicants complete a self-declaration form.

A self-declaration relies on the honesty of the individual to provide complete and accurate information.

Where the position is listed as exempt under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, it is essential that employers make clear to the applicant that you are entitled to seek information about all spent and unspent convictions that are not subject to the filtering rules introduced on 29 May 2013 and that any information disclosed will be verified by obtaining a standard or enhanced check through the DBS. Employers are recommended to obtain self disclosures using the following forms:

- **Model Declaration form A** for the purpose of obtaining information on positions which are exempt under the Act about spent and unspent convictions and cautions (including reprimands and final warnings)
- **Model Declaration form B** for the purpose of obtaining information on positions which are non exempt and where employers can ask for current unspent convictions and cautions (including reprimands and final warnings) only.

These forms can be downloaded at:

www.nhsemployers.org/RecruitmentAndRetention/Employment-checkStandards/ModelDeclarationForms. Further details about the filtering rules can be found on page 15.

Where advertising vacancies on NHS Jobs, the self declaration questions will form part of the application interface and therefore employers do not need to issue the Model Declaration forms separately. It is essential that employers clearly indicate the eligibility of the position being applied for so that the appropriate questions are made available on the system for the applicant to fill in.

For reasons of transparency, employers should make clear to applicants that in completing and signing the self-declaration form, they are giving their consent for the information provided to be verified by obtaining an appropriate DBS check, where this is relevant to the position being applied for. It is therefore essential that employers provide details to explain to applicants why checks are being made, the level of check being obtained, the type of information that may be disclosed about them, who information will be shared with, and how this will be recorded and handled, as part of their recruitment pack. Employers should also advise applicants where they can seek independent advice, should they have any concerns or who to contact if they have any questions about providing criminal record information.

Self-declaration information must be handled and in the same way as DBS check information – see section on handling and retaining criminal record information in Appendix 4.

Disclosure and Barring Service (DBS)

The Disclosure and Barring Service (DBS) provides criminal record and barring functions to help employers make safe recruitment decisions.

The criminal record checking service allows employers to access the criminal record history of people working or volunteering, or seeking to work or volunteer in certain positions, especially those that involve working with vulnerable groups.

Gathering criminal record checks can be time consuming and adequate time must be factored into the recruitment process to prevent unnecessary delays in making appointments. Where submitting multiple applications to the DBS, it is highly recommended that employers consider the electronic services (E-Bulk) to apply for disclosures online. This considerably speeds up the checking process, reduces time to recruit, and therefore agency spend. For further information and to register to use E-Bulk service, see the DBS website at:

www.gov.uk/e-bulk-submitting-multiple-applications-for-dbs

Employers are responsible for ensuring that DBS application forms are completed correctly to avoid any unnecessary delays in processing. Further guidance and tips on completing the application forms can be found on at:

www.gov.uk/disclosure-and-barring-service

For applicants appointed after 17 June 2013, employers may ask them to subscribe to the DBS Update Service. The Service is designed to enable those who are eligible for DBS checks to move posts more quickly where their activities do not change the level of check required or the type of access to vulnerable groups. Subscription to the Service is voluntary and it is therefore up to employers to promote the benefits to prospective employees.

Employers may find it useful to refer to the supplementary briefing document which can be found at: **www.nhsemployers.org/RecruitmentAndRetention/Employment-Check-Standards/ToolsAndResources** which provides more detail about the changes to the DBS service.

Further information about the Update Service can also be found on the DBS website at: **www.gov.uk/dbs-update-service-employer-guide**

When undertaking an online check using the Update Service, employers must request that the applicant provides them with an original copy of their DBS disclosure certificate so that information can be checked against that held online. Employers should validate the DBS disclosure certificate in the same way they would with other legal documents presented as part of the recruitment process. See Appendix 5 of this document for checking the authenticity of disclosure certificates.

Overseas police checks

Criminal records are held in the country or jurisdiction where the offence or alleged offence occurred, therefore where recruiting from overseas, or where an applicant discloses that they have spent an extensive period abroad, employers will need to consider whether they need to request a police check or obtain a 'certificate of good character' from that country.

A number of agencies such as the Security Industry Authority (SIA) recommend that employers should request a certificate of good conduct or overseas police checks for all applicants who live overseas, or have disclosed that they have spent a continuous period of six months or more outside of the UK in the last five years prior to their application for the position being offered.

Where an applicant has declared that they have been serving overseas in the military for a period of six months or more in the past five years, employers may request them to submit an extract from their military record instead. The extract must be original, state that it covers all periods served overseas, provide information in relation to any convictions, cautions, reprimands or final warnings received during the periods concerned, and be from an identifiable source so that information can be verified. Further information about requesting an extract of a military record can be found on the SIA website.

Where the position meets the criteria for a DBS check, even if the applicant claims they have never lived in the UK before, a DBS check should still be obtained in addition to the individual's overseas criminal records to verify that they have no criminal history in the UK. At the same time, it may be beneficial to encourage the individual to subscribe to the Update Service. This will also enable organisations to ensure, when recruiting to posts in regulated activity, that the person is not barred by the DBS.

Currently, the DBS cannot access criminal records held overseas. However, in a small number of cases, overseas criminal records are also held on the Police National Computer (PNC) and these will be revealed as part of a DBS check.

All overseas police checks must be in accordance with that country's justice system and UK requirements. Employers should refer to guidance published on the DBS website which explains how to access information from a list of countries at:

www.gov.uk/dbs-check-requests-guidance-for-employers-overseas-applicants

Employers requesting a criminal record check from overseas should be aware that the criminal record may be returned in a different language and you may need to make provision to have it translated. The accuracy and authenticity of the information typically depends on how the certificates are obtained. The translation of any such information must be carried out by an individual who is professionally accredited or a translation company that is accredited by either the Chartered Institute of Linguists (CIOL) or the Association of Translation Companies (ATC).

Some foreign embassies and high commissions in the UK initiate requests on behalf of applicants and liaise with the relevant issuing authority abroad. This normally involves the individual being required to provide documentary evidence of their identity, completing forms, paying a fee, and sometimes this will also require them to provide fingerprints. The results of any such check are returned to the embassy or high commission and then forwarded onto the applicant. It is important that employers allow sufficient time within their recruitment processes for this information to be received.

In cases where prospective employees have to apply to the issuing authority directly, the relevant UK-based embassy or high commission may still be able to provide advice on what to expect. If there is any doubt about the documentation produced, they may also be able to authenticate the search results.

If the country that you are looking for is not listed on the DBS website, you may wish to contact the country's representative in the UK. Contact details for those countries that have a representative in the UK can be found on the Foreign and Commonwealth website at www.fco.gov.uk or by telephoning 020 7008 1500.

Additional information can also be sought from the Security Industry Authority (SIA) website at: www.sia.homeoffice.gov.uk/Pages/licensing-countries

Employers may find it useful to refer to the guidance document on the DBS website for further advice about obtaining checks when individuals cannot provide a five year UK address history because of travel or time spent overseas at: www.gov.uk/unusual-address

Types of DBS checks and eligibility

Employers and umbrella bodies must ensure that the position they are recruiting to is regarded as eligible for a standard or enhanced DBS disclosure under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended) and the Police Act 1997 (Criminal Record) Regulations 2002 (as amended).

Obtaining checks on individuals who are not being appointed to an eligible position, is unlawful. In cases of continuous serious misdirection, this can lead to the DBS revoking an employer's registration status to obtain checks through them.

There are three levels of check currently available through the Disclosure and Barring Service (DBS). The three levels include:

- Standard check
- Enhanced check without barred list information
- Enhanced check with barred list information - where the position is eligible, and the employer indicates the type of access to vulnerable groups, this will include:
 - an adults barred list check
 - a children's barred list check
 - an adults and children's barred list check

What is a standard DBS check?

Standard DBS checks contain details of both current unspent and spent convictions, cautions, reprimands and final warnings, held in England and Wales on the Police National Computer (PNC) that are not subject to the filtering rules which came into force from 29 May 2013 (see section below). Most of the relevant convictions in Scotland and Northern Ireland may also be included.

While not a legal requirement, employers may carry out standard checks to assess a person's suitability for work listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 i.e. where the type of work enables the person to have '*access to persons in receipt of such services in the course of [their] normal duties*' (paragraph 13 of Schedule 1 of the Exceptions Order specifically refers).

For the purpose of this guidance we would advise that 'access to persons' does not include positions which only allow limited or 'incidental' contact with patients (i.e. where there is no more opportunity for contact with patients than that of a visitor to the hospital site, or where staff are required to pass through patient areas to get to their normal place of work).

This level of check does not show whether a person is barred from working with children or adults and therefore should not be applied for where the individual will be undertaking regulated activity. Any application for a standard check which includes a request for a check against the barred list will be halted on receipt at DBS and returned unprocessed.

What is an enhanced DBS check?

Enhanced checks contain the same information as a standard DBS check but may also include any non-conviction information held by local police, where they consider it to be relevant to the post. Although barred list checks are not appropriate for positions which fall outside of regulated activity, in most cases, the police will have the information which led the DBS to bar a person and so will be able to disclose it on an enhanced certificate, where this is relevant to the position being applied for.

To be eligible for an enhanced level DBS check, the position must be included in both the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the Police Act 1997 (Criminal Records) Regulations 2002 as amended by the Police Act 1997 (Criminal Records) (Amendment) Regulations 2013. This includes work or volunteering with vulnerable groups.

Enhanced without barred list information

Employers can apply for an enhanced check without barred list information for positions described as work with adults in the Statutory Instrument - The Police Act 1997 (Criminal Records) (Amendment) Regulations 2013 which came into force on 29 May 2013.

To be eligible, individuals must be involved in providing one of the following activities at least once a week on an on-going basis, more than four days in any 30 day period, or at any time between the hours of 2am and 6am:

- care or supervision
- treatment or therapy
- teaching, training instruction, assistance, advice or guidance on emotional, physical or educational well-being - wholly or mainly for children or adults in receipt of a health care service
- the management of people engaging in any of the above activities on a day to day basis.

It should be noted that where individuals are providing any of the above activities in an 'unsupervised' capacity for children, this would be deemed regulated activity and therefore is eligible for a barred list check - see section below.

This list is not exhaustive, and employers must refer to The Police Act 1997 (Criminal Records) (Amendment) Regulations 2013 when considering the roles and responsibilities of the position when considering whether they can require an enhanced without barred list check which can be found at: www.legislation.gov.uk/uksi/ThePoliceAct

Enhanced check with barred list information

Employers have a legislative requirement to request barring checks to be conducted for people in positions defined as 'regulated activity' under the Protection of Freedoms Act 2012 which amended the Safeguarding Vulnerable Groups Act 2006 on 10 September 2012.

What is regulated activity?

'Regulated activity' is a term which is used both in the regulation of care services under the Health and Social Care Act, and to activities a person who is listed on the DBS barred lists is prohibited from doing under the Safeguarding Vulnerable Groups Act. The terms mean very different things in the two different contexts. By way of clarity, this guidance specifically focuses only on the latter.

Where an individual is engaging, either in paid work or as a volunteer, in a regulated activity employers must request an enhanced DBS check with a check against the appropriate barred list. Where individuals are undertaking activities with both adults and children it would be appropriate to check against both barred lists.

It is an offence for any organisation to 'knowingly' appoint or continue to allow an individual who is barred from working with children and/or adults to engage in a regulated activity with that group. Barring checks are accessed through the process of applying for an enhanced criminal record disclosure.

There are six categories within the new definition of regulated activity, these include where the individual will be providing any one of these activities as part of their role:

- healthcare
- personal care
- social work
- assistance with cash, bills or shopping
- assistance with the conduct of their own affairs
- conveying services

Regulated activity still excludes family arrangements; and personal, non-commercial arrangements. There is no frequency test for providing these activities.

In addition to the above activities, regulated activity also includes where an individual is providing 'unsupervised' teaching, training, instruction, caring for or supervision of children, where these activities are undertaken 'frequently'. Frequently is determined as once a month or more, three or more days in any 30 day period or overnight between the hours of 2am and 6am. Activities undertaken in a supervised capacity i.e. reasonable day to day supervision under the direction of a healthcare worker, is not regulated activity, therefore employers may wish to consider whether the roles and responsibilities meet the criteria for an enhanced without barred list check or a standard level check.

It should be noted that children's hospitals are no longer listed as a 'specified place' and therefore additional requirements to regard a broader range of positions under regulated activity, as was originally defined in the Safeguarding Vulnerable Groups Act no longer applies. Employers will therefore need to consider eligibility of staff who have access to children under the new definition of regulated activity at Appendix 3. Where individuals are not providing regulated activity, they may still be considered against eligibility to obtain a standard DBS check.

Employers may find it useful to refer to the explanatory notes on regulated activity which can be found at:

- Regulated Activity with adults (Department of Health)
www.gov.uk/Regulated-Activity-Adults-Dec-2012
- Regulated Activity with children (Department of Education) and guidance on supervision
www.education.gov.uk/childrenandyoungpeople/safeguardingchildren/disclosure-barring

Filtering of information included as part of a DBS disclosure

Employers should be aware of the following Statutory Instruments which came into force on 29 May 2013:

- Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 which amends the definition of 'relevant matters' in the Police Act 1997, being the information which should be disclosed in an standard or enhanced check.

- Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 which made amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 to provide that certain spent convictions and cautions will become 'protected' when specific conditions are met and therefore are not subject to disclosure through a DBS checks.

Employers must take care not to ask questions which could potentially lead to an applicant disclosing protected convictions or cautions and cannot take any such information into account as part of the recruitment process. The Model Declaration forms were amended in July 2013 in compliance with new legislation. Further information can be found in Appendix 2.

Employers may find it useful to refer to guidelines included in Appendix 3 which outlines considerations which should be made where a DBS check results in a positive disclosure i.e. contains criminal record information.

When should I request a criminal check?

Where employers are entitled to request a DBS check, it is common to undertake checks once a provisional offer of appointment has been made. It is important to make clear that any offer of appointment and/or contract of employment are conditional on satisfactory employment checks being carried out and verified, including undertaking an appropriate DBS check.

DBS disclosure certificates carry no formal period of validity. Employers may therefore wish to consider undertaking periodic checks during employment – see section below

Portability

The DBS define 'portability' as meaning the re-use of a disclosure obtained for a position in one organisation and later used for another position in another organisation.

Information included as part of a disclosure certificate has no term of validity and it only provides information in relation to what is known about the individual up to the point of its issue. It is therefore strongly recommended that employers make clear the benefits of subscribing to the Update Service to prospective employees as part of their recruitment process.

Employers may accept a previously issued DBS check where individuals have not subscribed to the Update Service, but must have robust recruitment processes in place to make an informed judgement about whether to accept an existing DBS check rather than requiring a new one. Some of the key factors that need to be considered are:

- the possibility that the applicant's criminal record or other relevant information may have changed since its original issue. It is important to note that DBS checks only ever provide a snap-shot in time and will not cover any investigations, court proceedings/charges, or surveillance in process or issued on, or after, the date the DBS certificate was issued

- any additional information provided by the Chief of Police, will have been issued where it was deemed relevant to the position for which the DBS check was originally applied for, and therefore no assumption should be made that no other intelligence would be disclosed for a different position
- the information revealed was based on the ID of the applicant, which was validated by another registered body at that point in time. Therefore, employers should ensure that they verify details on the certificate match those of the applicant and other documentary evidence provided as part of the recruitment process.

Where accepting pre-disclosed information, an employer must be satisfied that they can evidence that a check has been done. This can be done in a number of ways including:

- electronic transfer of data
- hard copy of previously issued certificate
- verification by previous employer via confirmation of employment
- by undertaking a check using the Update Service where the applicant has subscribed to the Service and has given their permission to the employer to access information held on them.

Employers receiving pre-disclosed information must be satisfied that information can be authenticated and is genuine - see Appendix 5.

Where the new position requires a different level of clearance i.e. they are moving into regulated activity for the first time, or where they were previously working with a different vulnerable group, then a new DBS check must always be undertaken.

Employers must only accept original copies of the DBS certificate. Photocopies should not be accepted - see section on checking authenticity of criminal record certificates.

Starting work prior to receipt of a criminal record check

Staff that are new to the NHS

Where individuals are taking up appointment in the NHS for the first time, employers may issue a conditional offer of employment before receiving the result of a DBS check however, it is important to emphasise that an employer will be committing an offence under the Safeguarding Vulnerable Groups Act, if they knowingly permit a person to engage in regulated activity from which the person is barred.

The individual will also be committing a criminal offence where they engage in a regulated activity for which they are barred. It is therefore strongly recommended that individuals are not permitted to undertake any form of regulated activity, until the outcome of any barred list check is known.

Employers may, in exceptional circumstances, make a risk-based decision to appoint applicants while they are awaiting the outcomes of a DBS check for the purpose of undertaking induction

training; or to undertake other duties which would not include them engaging in any form of regulated activity. In any such cases, the employer should ensure:

- an appropriate DBS check has been applied for; and
- safeguards are in place to manage that individual i.e. full supervision where given access to patients and restricted duties, until the outcome of a DBS check has been received.

Employers should also consider whether there is a defined easement in place for periodic checks to be undertaken for particular staff groups - see section on easements on page 18.

Existing staff changing jobs within the same organisation

A new DBS check is not normally required where an existing member of staff has previously had a DBS check (or CRB check if prior to 10 September 2012) and is moving internally to a new job where the roles and responsibilities do not require a different level of check.

The requirement for a new DBS check is triggered where:

- the individual has never had a criminal record check before and is moving to a position that now requires them to have a check
- the new position significantly changes the individual's role, responsibilities, or level of contact with vulnerable groups i.e. involvement in a regulated activity which requires a different level of check, or a check against one or both barred lists.

Employers should make it clear to all staff that they have a contractual obligation to disclose any criminal convictions, cautions, reprimands and warnings that are subsequently acquired during their employment. The disclosure should be made in confidence so that the employer can consider the effect of the offence against the position held. Volunteers and temporary workers should also be required to make a similar disclosure.

Existing staff may be subject to disciplinary action and possible dismissal if they knowingly fail to disclose relevant information in relation to their criminal record or barred list status. It is a criminal offence to knowingly allow an individual to continue to engage in a regulated activity when they are barred from that activity. It is also a criminal offence for that individual to apply for, or to engage in, regulated activity when they are barred from undertaking that activity.

Easements

While the legislation does not explicitly refer to employers relying on checks completed by previous employers or other organisations, it is considered reasonable that NHS organisations co-operate to minimise the risk of employing a person that is barred from a regulated activity or has a criminal record that might result in a person being unsuitable to employ or engage in certain activities.

Easements are also relevant where individuals have not subscribed to the Update Service. This may include certain staff groups that operate either under education programmes that mean that they move from employer to employer frequently, or employees that might otherwise work for more than one organisation at the same time, including through agencies, and therefore only one organisation need be responsible for obtaining relevant checks. The

employing organisation should seek written assurances from that organisation that appropriate clearances have been obtained and that the individual is not barred from engaging in a regulated activity.

A number of specified easements have been put in place for certain highly mobile staff. This is because the frequency that they are required to move from position to position far outweighs the risk, so the trigger for DBS checks to be carried out each and every time they change positions has been relaxed – see further guidelines in the section below.

Now the Update Service has been launched the Department of Health and NHS Employers will continue to consider whether these easements are necessary.

Doctors in training

Doctors on educationally-approved rotational training are regarded as being in continuous employment during the full term of their training and are therefore required to have a DBS check, as a minimum, once every three years rather than each time they change rotation.

Employers must seek written assurances from the host/previous employer that appropriate clearances have been obtained within the last three years. Trusts may undertake DBS checks more frequently, but any additional checks must be proportionate to risk. For example, where assurances cannot be obtained or where you are made aware of criminal activity.

Where it is highly likely that the individual will be working in regulated activity with both children and adults at an early stage in their training programme, it is strongly recommended that the initial DBS check includes checks are made against both barred lists.

Temporary workers supplied by an agency

Temporary workers supplied by an agency are recommended to have DBS checks at least once a year.

The employing organisation is required to assure itself that appropriate DBS checks have been obtained within the last 12 months by seeking and evidencing assurances from the agency. Employers may require more frequent checks i.e. where any such assurances have not been provided by the agency, or a new post changes the level of check required, or where there is a concern about an individual's criminal history.

The recommendation for annual checks does not apply to individuals who are working for a trust bank or are registered with NHS Professionals, where they are working in this capacity and hold a substantive NHS contract. The contracting organisation should seek written assurances that the substantive employer has carried out appropriate checks at the correct level when they were first appointed. If however, the individual leaves their substantive post, or where there is a break in service of three months or more prior to them applying to a trust bank or NHS Professionals, then a new DBS check should always be requested.

Staff providing emergency services or training

Staff who are highly mobile, such as doctors or senior clinicians who hold a substantive post within one trust but are required to provide support with emergency or complex cases, often at

very short notice, or to provide speciality training in another NHS organisation, are also regarded as being in continuous employment and do not require a new DBS check.

Employers should seek confirmation from the individual's substantive employer that appropriate checks have been carried out at the correct level. Only where such assurances cannot be given, should a further check be required.

Retrospective and periodic checks

There is no legal requirement to carry out retrospective or periodic DBS checks on staff or volunteers who are already in your workforce and are not changing positions:

- Retrospective checking means checking staff, volunteers and other workers in the workforce who have never had a criminal record check. For example, where they were appointed prior to the mandated requirement to check came into force in 2002 and they have remained in the same position, therefore the normal requirement for a check has not been triggered.
- Periodic checking means the checking of staff, volunteers or other workers at particular intervals during their term of employment/appointment.

It is recommended that NHS organisations carefully consider any plans to administer retrospective or periodic checking on existing staff, volunteers or other workers and that adaptation is proportionate to protect patient safety. Any decision to require such a check and the prescribed time period after which staff should be rechecked should be proportionate to risk and discussed in partnership with the legal advisers and unions at a local level.

Where your organisation administers periodic checks, it may be beneficial to encourage individuals to also subscribe to the Update Service at the same time as making the application for a new a DBS check.

It is not recommended that employers introduce new policies on periodic checks purely to enable staff/volunteers and other workers to subscribe to the Update Service. Employers should encourage individuals to subscribe to the service when their periodic check is due or there is a normal trigger for a new check to be obtained. You should clearly outline to all members of staff/volunteers and other workers that it is company policy to undertake periodic checks.

Employers must ensure that they remain legally entitled to obtain information by way of undertaking a DBS check and that this is at the correct level for the post being applied for. For example it is unlawful for any employer to require an enhanced DBS check with barred list information for any position other than a regulated activity.

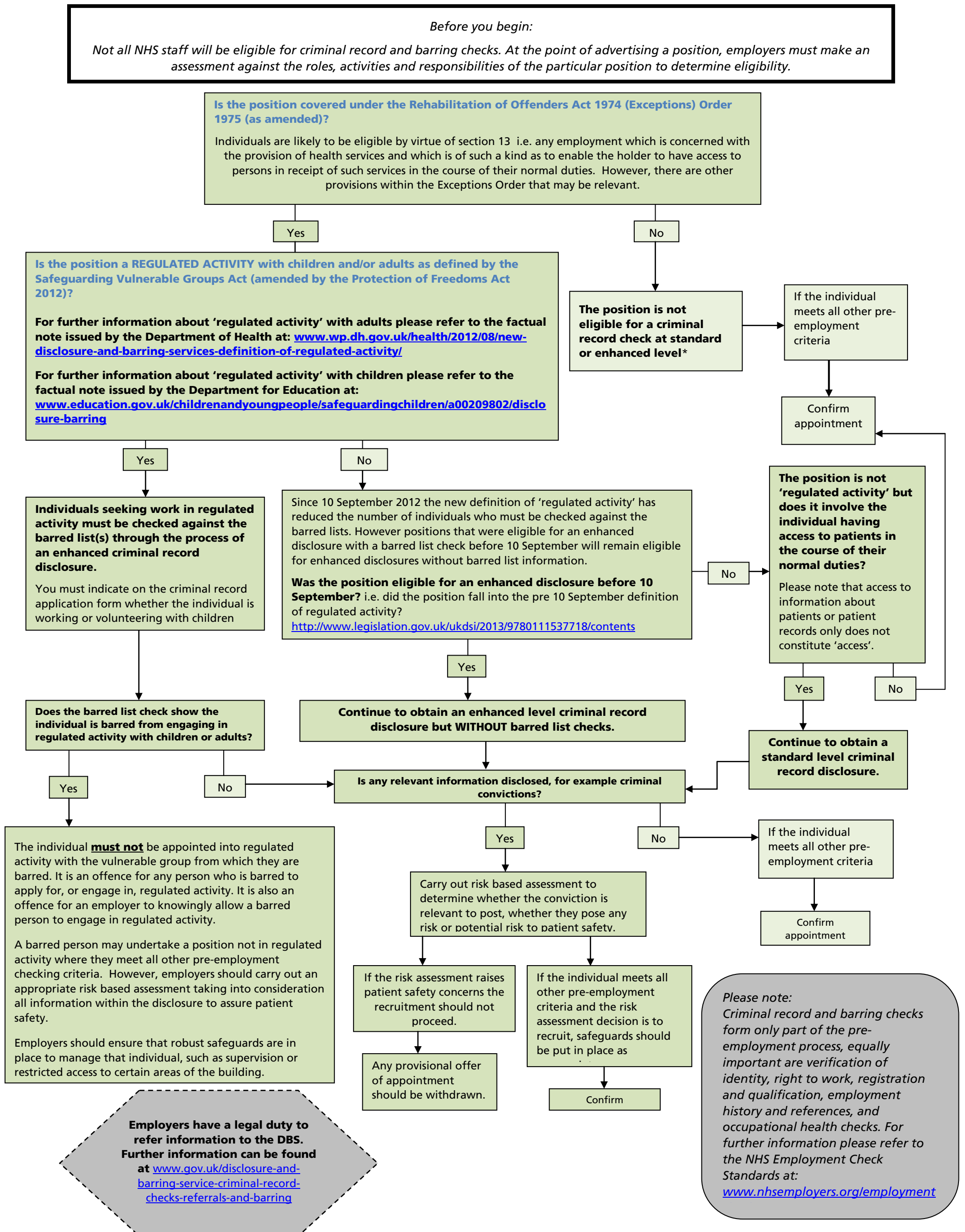
Duties to refer to the DBS

Under the Safeguarding Vulnerable Groups Act, employers have a legal duty to refer information to the Disclosure and Barring Service if an employee or volunteer has harmed, or poses a risk of harm to vulnerable groups and where they have dismissed them, or removed them from working in a regulated activity with children or adults. This duty equally applies where an individual has resigned before a formal decision to dismiss or remove them from

regulated activity has been made. Further details on referral duties have been outlined in Appendix 6 of this document.

Employers will find it useful to refer to further more detailed information which can be found on the DBS website at: **www.gov.uk/disclosure-and-barring-service-criminal-record-checks-referrals-and-barring**

Appendix 1: Criminal record and barring check decision tree



* In certain circumstances, for example, people working in 'positions of trust' e.g. chief executives, senior management or finance managers you may wish to ask prospective employees to apply for a basic disclosure from Disclosure Scotland. This level of disclosure contains information about unspent (current) convictions. Further information is available at: www.disclosurescotland.co.uk

Appendix 2: Legislation

The Protection of Freedom's Act 2012 responded to recommendations made in Sunita Mason's review of the criminal records regime and the Government's review of the Vetting and Barring Scheme (VBS). The Act made some key changes to the disclosure and barring system.

Employers should refer to the DBS information leaflet 'What you need to know' which can be found at: www.gov.uk/government/disclosure-and-barring-information-leaflets

Below is a summary of some of the key milestones and changes that employers need to be aware of:

From 17 June 2013:

- The launch of the new 'Update Service' making DBS checks more portable. This enables employers to go online and check whether there is any new known criminality information on any individual who applied for their DBS certificate on or after 17 June and subscribed with the Update Service.

The online check will not provide detailed information but will indicate where new information exists and therefore prompts a trigger for a new check.

The Update Service is voluntary and is available to individuals for an annual fee of £13, it is free for volunteers.

- The introduction of a single applicant only disclosure certificate – previously the DBS certificate was sent to the employer and the applicant at the same time. This changed on 17 June, and now the disclosure certificate is issued to the applicant only. Employers are required to request that all applicants provide them with their original DBS certificate, and will be able to see (using the DBS online tracking facility as described above) whether any further information is known, and if necessary obtain a fresh check.

Further amendments to legislation is scheduled early 2014 that will make it a legal requirement to check the barred lists before engaging a person in Regulated Activity.

From 29 May 2013:

Filtering of information included within a DBS disclosure:

New arrangements came into effect on 29 May 2013, which mean that certain old and minor cautions and convictions will no longer be disclosed in a criminal record certificate from this date.

This follows the judgement made by the Court of Appeal on 29 January 2013, which stated that the disclosure of all convictions and cautions in a criminal record certificate contravened with Article 8: Right to Respect for Private and Family Life, of the European Convention on Human Rights legislation.

The new arrangements are intended to provide individuals with the opportunity to leave behind mistakes made when they were young.

Ensuring patient and public safety is paramount, therefore certain convictions and cautions will always be disclosed in a criminal record certificate - see the list of specified offences that can be found on the Disclosure and Barring Service (DBS) website at: **www.gov.uk/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check**

These changes relate to England and Wales only and are enforced by the following pieces of legislation:

- The Police Act 1997 (Criminal Record Certificates: Relevant Matters (Amendment) (England and Wales) Order 2013
- Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013

What do these changes mean

The new filtering system introduces a strict set of rules that must be satisfied before any decision is made as to whether information should not be disclosed in a criminal record certificate.

In relation to *convictions* committed by an adult, information will not be disclosed where all four conditions outlined below are met:

- eleven years have elapsed since the date of the conviction
- it is not listed as one of the specified offences which must always be disclosed
- it did not result in a custodial sentence, and
- the individual does not have more than one conviction.

Cautions issued to an adult will not be disclosed where:

- six years have elapsed since the date of that caution being issued, and
- where the caution does not appear on the specified list of offences.

In relation to *convictions* committed by individuals under the age of 18, information will not be disclosed where:

- five and a half years have elapsed since the date of the conviction
- it is not one of the specified offences which must always be disclosed
- it did not result in a custodial sentence, and
- the individual does not have more than one conviction.

Where the *caution* was issued to an individual under the age of 18, information will not be disclosed where:

- two years have elapsed since the date of issue, and
- the caution does not appear on the list of specified offences

Police forces will continue to use their common law powers to share information which they reasonably believe to be relevant and which, in their opinion, should be disclosed within the criminal record certificate.

It is important to stress that criminal record checks are one of a number of checks required in the appointment of staff in the NHS. Employers must be encouraged to use a holistic approach and make judgements on an individual's suitability based on the information they are able to gain as part of the whole recruitment process.

Further information

More detailed information about the filtering rules are available on the DBS website at: www.gov.uk/disclosure-and-barring-service

From 1 December 2012:

- A new definition of Regulated Activity (as outlined within this guidance).
- The 'Controlled Activity' category was repealed. Positions previously identified as "Controlled Activity" have either become Regulated Activity or are now outside Regulated Activity altogether.
- Individuals aged under the age of 16 are no longer eligible for a DBS check.
- What the police can disclose is now subject to a strengthened relevancy test and individuals can ask the Independent Monitor to review what is disclosed on their certificate.
- The functions previously provided by the Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) have merged to form the Disclosure and Barring Service (DBS). Now one organisation deals with both checks and barring decisions.

Safeguarding Vulnerable Groups Act 2006

The Safeguarding Vulnerable Groups Act 2006 was created in response to recommendations made in the Bichard Inquiry which was undertaken following the Soham murders in 2002. The Inquiry questioned the way organisations recruited people to work with vulnerable groups, and particularly the way background checks were carried out. The Act provided the legal basis to set up the Independent Safeguarding Authority (ISA) and laid the foundation for what was originally known as the Vetting and Barring Scheme (VBS). It set out the type of work and activities that a person who has been barred must not do, known as 'regulated activities'.

In June 2010, the Government announced that the VBS was to be halted because of concerns about the proportionality and bureaucracy of the scheme. A thorough review was undertaken with a view to scaling back the criminal records and barring systems and that these would be reduced to common sense levels.

Amendments to the system came into force on 1 May 2012, under the terms of the Protection of Freedom's Act.

Police Act 1997

The Police Act 1997 (s113A) enables standard criminal records checks to be requested by employers on any individual who is working in a role listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended) ("the Exceptions Order"). This includes any employment which is concerned with the provision of health services and which is of such a kind as to enable the holder to have access to persons in receipt of such services in the course of their normal duties. Standard checks include information on cautions, convictions, reprimands and warnings that are not subject to filtering rules which came into force on 29 May 2013 as previously outlined on page 23.

The Police Act 1997 (s113B) enables enhanced criminal record checks to be requested for the purposes prescribed in the Police Act 1997 (Criminal Records) Regulations 2002 ("the Police Act regulations"). Enhanced checks include information on cautions, convictions, reprimands and warnings that are not subject to the filtering rules, as well as local police information.

Not all NHS staff are eligible for a criminal record check, it will depend if their role falls within the Rehabilitation of Offenders Act 1974 (Exceptions) 1975 Order. The level of check (standard or enhanced) is dependent upon whether the role then falls within the Police Act regulations. The Exceptions Order and the Police Act determine eligibility for a check and the level of check required but do not prescribe which individuals need to be checked.

Eligibility is not determined by job title or type of contract, employers will need to make an assessment against the roles, activities and responsibilities of that particular post.

See section above which outline recent amendments to the Police Act 1997 (Criminal Record Certificates: Relevant Matters (Amendment) (England and Wales) Order 2013 in relation to eligibility for enhanced DBS checks.

Rehabilitation of Offenders Act 1974 (as amended)

The Rehabilitation of Offenders Act (ROA) 1974 enables some criminal convictions to become 'spent', or ignored, after a 'rehabilitation period'. A rehabilitation period is a set length of time from the date of conviction. After this period, with certain exceptions, an ex-offender is not normally obliged to mention the conviction when applying for a job or obtaining insurance, or when involved in criminal or civil proceedings.

Once this period of rehabilitation has passed, the conviction is regarded as 'spent'. In normal circumstances the convicted person does not have to reveal any 'spent' convictions to a prospective employer when applying for a job. However, in order to protect vulnerable groups, some professions and roles within the health and social care sectors are exempt from this approach under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. In the case of these professions and roles, employers are entitled to know about all previous criminal record information, whether spent or unspent (including reprimands, final warnings, and cautions) and to take this information into account when assessing an individual's suitability for the post.

Where it is deemed relevant to the position being applied for, local police forces can use their common law powers to authorise the disclosure of other information held on their records.

See section above which outline recent amendments to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 in relation to what information is included and should be considered as part of the DBS disclosure.

Appendix 3: What to do when a check reveals a positive disclosure

Having a criminal record does not automatically mean that an individual cannot work in the NHS. Employers will need to make a fair, non-discriminatory assessment based on the individual's skills, experience and suitability for the post. The decision always rests with the employer as to whether to allow a person whose criminal record check reveals a conviction, caution or other information to be appointed into a position. The information obtained should be carefully considered and judged on a case-by-case basis. It is therefore important that every employer has a policy in place.

Where the disclosure indicates that the DBS has made a barring decision against one or both of the barred lists, it is illegal for an employer to allow that person to engage in a regulated activity from which they are barred. It is also a criminal offence for a barred person to apply for work or to engage in a regulated activity.

It is important for employers to bear in mind that a DBS check will only reveal the basic facts about criminal offences, warning and reprimands, such as the name and date of the offence and, if applicable, details of any sentences/charges. It will not put this into any context. You should carefully consider the situation before offering any appointment to individuals who are:

- on probation (in a legal sense)
- under a suspended prison sentence
- released from prison on parole
- still under a conditional discharge
- subject to Terrorism Prevention and Investigation Measures.

When considering disclosure information employers must be mindful of:

- any legal or regulatory requirements (i.e. in relation to regulated activity)
- the seriousness of the offence – under the new filtering system certain specified offences (because of their serious nature) will always be included in a DBS disclosure regardless as to whether they are spent or unspent and therefore must be considered by the employer - see list of specified offences on the DBS website at: www.gov.uk/government/dbs-list-of-offences
- the length and type of sentence issued
- whether the applicant has a pattern of offending behaviour. If there are multiple offences, regardless of their seriousness or whether they are spent or unspent, these will always be included in a DBS disclosure. People who have a pattern of offending right up to the present date have clearly not put their offending behind them. Those people with gambling, drink or drugs related convictions in particular may remain a risk unless there is evidence of a clear break in the pattern of their offending
- the circumstances surrounding the offending behaviour and the explanation offered by the individual. An explanation of the circumstances surrounding an offence will often be

plausible and reassuring. For example, if the individual explains that, in fear and panic, they ended up assaulting someone who was threatening them, they may not be as culpable as an individual who caused serious injury with intent.

The DBS Code of Practice, as outlined in the section above, makes clear that any information disclosed on a DBS certificate should be used in line with your organisation's policy on the recruitment of ex-offenders. This may simply be an appendix to your recruitment policy, or an application form that provides assurances to the applicant that fair consideration will be given against their skills and ability to do the job being offered. A model policy for the recruitment of ex-offenders can be found on the DBS website which can be used or adopted within your own organisation at: **www.gov.uk/sample-policy-recruitment**

Appendix 4: Handling and retention of criminal record information

All organisations registered with the DBS, known as registered or umbrella bodies, must observe the *Code of Practice for registered persons and other recipients of disclosure information (April 2009)*. The code is designed to ensure that any criminal record information released is used fairly and is handled and stored appropriately. In particular, employers are required to:

- treat all applicants fairly and without discrimination
- ensure that all applicants for eligible positions are notified in advance that criminal record information will be obtained
- have a written policy on the recruitment of ex-offenders that can be given to all applicants where criminal record information will be requested
- have a written security policy covering the correct handling and safe storage of criminal record information
- ensure that criminal record information is only supplied for the purpose of a recruitment (or other relevant) decision
- discuss the content of the criminal record certificate with the applicant before withdrawing any offer of employment
- ensure that they comply with DBS guidance on the portability of criminal record checks and their contents.

Employers must ensure that information is kept securely in lockable, non-portable storage containers with access strictly controlled and limited to persons who need to have access to this information in the course of their duties.

This information must only be used for the specific purpose it was requested for and with the applicant's full consent. Section 124 of the Police Act 1997 makes clear that it is a criminal offence to share criminal record information with any individual who is not entitled to receive it. However, if the applicant freely gives their consent to the sharing of this information, then an offence has not been committed.

Criminal record information should not be retained for any longer than necessary. Once a decision has been made as to whether to appoint or not, it should be kept for no longer than six months from appointment, and six months from where the applicant has been unsuccessful, to allow for the consideration and resolution of any disputes or complaints.

If, in exceptional circumstances, it is considered necessary to keep criminal record information for a longer term than this, employers should make a request to the DBS Data Protection Manager via **dataprotection@dbsgsi.gov.uk** to ensure this does not contravene with the data protection or human rights of that individual. Once this period has elapsed, information must be destroyed by secure means (for example, by shredding, pulping or burning). Safe storage and strictly controlled access must still be adhered to while documents are awaiting destruction.

Employers must retain a record of the following on ESR or other HR management system:

- the name of the individual and issue date of the criminal record certificate
- the level of check requested, including any checks against one or both of the barred lists
- the position for which the certificate was requested
- the unique reference number of the certificate; and
- if subscribed to the Update Service, the individual's unique reference number.

A copy of the Code can be found on the DBS website at:

www.gov.uk/dbs-code-of-practice

Appendix 5: Checking authenticity of criminal record certificates

Criminal record disclosure certificates contain a number of security features that can be used to verify whether a disclosure has been counterfeited or altered in any way.

The security features are:

- a 'crown seal' watermark repeated down the right-hand-side of the disclosure, which is visible both on the surface and when holding the disclosure up to light
- a background design incorporating the word 'disclosure', which appears in a wave-like pattern across both sides of the document. The colour of this pattern is uniform across the front of the disclosure but alternates between pink and green on the reverse
- fluorescent inks and fibres that are visible under UV light
- ink and paper that will change colour in the presence of water or solvent-based liquid.

A CRB disclosure certificate issued before 1 December 2012, will have the same security features as a DBS disclosure certificate.

If you are unsure whether a DBS certificate is genuine or if you think that it may have been altered, you should contact the DBS on 0870 90 90 811.

Guidance on how to check the security features of a DBS certificate can be found on the DBS website at: www.gov.uk/dbs-check-requests-for-employers

Further guidance on validating all other documents for the purpose of verifying and individuals identity can be found in the Identity Check document at:

www.nhsemployers.org/RecruitmentAndRetention/EmploymentCheckStandards

Appendix 6: Legal duties to refer to the DBS

Under the Safeguarding Vulnerable Groups Act 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, the following groups have a legal duty to refer information to the Disclosure and Barring Service (DBS):

- Regulated activity providers (e.g. employer or voluntary organisations)
- Personnel suppliers (e.g. employment agencies, employment businesses, educational institutions such as medical schools)

In addition, legislation outlines those bodies who have a legal power to refer, these include:

- Local authorities
- Education and Library Boards (Northern Ireland)
- Health and Social Care Trusts (Northern Ireland)
- Keepers of registers (professional regulatory bodies such as the GMC, NMC etc)
- Supervisory authorities (inspectors such as CQC).

Regulated Activity providers and personnel suppliers who fail to provide prescribed information without a reasonable excuse, where there is a duty to do so, will be committing an offence with a penalty of up to £5,000.

The legislation requires that a referral is made when the employee has been removed from regulated activity because of safeguarding concerns. It is for the employer to decide whether or not it is a safeguarding issue and if it is, whether or not it is appropriate to remove that person from regulated activity.

Therefore, if an employer decides there are no safeguarding concerns and does not remove the individual from regulated activity and do not make a referral, they have not committed an offence.

It is also an offence to fail to supply prescribed information without reasonable excuse, to the DBS should the DBS request this information - see section below.

What is 'prescribed Information'?

If you are an employer or volunteer manager and the DBS asks you for information about a person or case, you are required by law to provide the information listed below if you hold it. Where DBS requires only specific information this will be identified by DBS and you need only provide the specific information if you hold it.

Employers should refer to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008 at: www.legislation.gov.uk/uksi-20083265

When does an employer need to refer information to the DBS?

Where a person or organisation has a legal duty to refer, there are two main conditions which should be met for a referral to be made, these are:

1. They have permanently removed a person from 'regulated activity' through dismissal or permanent transfer from 'regulated activity', or where they would have removed or transferred that person from regulated activity if they had not left, resigned, retired or been made redundant; and
2. They believe the person has:
 - been cautioned or convicted of a relevant (automatic barring) offence;
 - engaged in relevant conduct in relation to children and / or adults – for example, an action or inaction (neglect) that has harmed a child or adult or put them at risk or harm;
 - satisfied the Harm Test in relation to children and / or adults – for example, there has been no relevant conduct (i.e. no action or inaction) but a risk of harm to a child or vulnerable still exists.

This duty equally applies to agencies or any other third party staffing provider where the above information is made known to them. This 'duty to refer' overrides any obligation to withhold information on the grounds of confidentiality. It is important organisations know their responsibilities in this regard.

A referral should not be made when an allegation is first made. An investigation and evidence gathering should be first undertaken by the person or organisation that would normally refer to the DBS. This is in order to establish if the allegation has foundation, for example as part of an internal disciplinary process. The DBS is required to clearly evidence its reasons for including a person in a barred list. Without evidence or substance to the claims, many referrals will be quickly closed down as there will be no foundation on which the DBS can proceed.

There may be occasions where an employer wishes to make a referral to the DBS in the interest of safeguarding vulnerable groups, including children but the legal duty to refer has not been met, for example - where an employer has strong concerns but the evidence is not sufficient to justify permanently removing the person.

The DBS will consider all referrals sent to it from any source and they are legally bound to do so. However, before an employer makes a referral to the DBS where the legal duty has not been met, they must be satisfied that they are doing so legally and complying with all relevant legislation, such as the Data Protection Act and Human Rights Act.

If the employee is in a registered profession, then the employer will need to consider whether they believe that individual may have breached their professional code of practice, and whether the matter is purely a professional issue, or a safeguarding issue, or both. It may be possible that there is a requirement to refer to both the DBS and a regulatory body.

If it is a safeguarding concern, it is important to note that the legal duty to refer to the DBS remains irrespective of any referral being made to a regulatory body. Therefore you will not have met your legal requirements by only referring to the regulatory body.

What information does the DBS require when making a referral?

The DBS does not have investigatory powers, so relies on evidence gathered as part of local investigations. The DBS must also evidence how it has come to a barring decision of an individual. Therefore, if investigations are not complete at the time of referral, it may be difficult for the DBS to adequately assess the suitability of an individual.

In order for the DBS to consider a case, they will need the following information as a minimum:

- Information that will clearly establish the identity of the individual, examples of this will include (but are not be limited to) the following:
 - name
 - address
 - date of birth
 - National Insurance (NI) number, if known.
- Sufficient evidence to suggest that there has been a relevant offence or harm/risk of harm to a child or a vulnerable adult.

Employers should provide all documentary evidence that is held in relation to the person, or the case that is asked for in the DBS referral form. However, employers are not expected to obtain or produce documents that they do not hold or have.

What documentary evidence will the DBS need to consider?

Convictions, police cautions and the findings of specified competent bodies (e.g. GMC) are treated as facts in DBS decision-making.

They also consider relevant information which may be provided or requested from regulated activity providers, the police, personnel providers and regulatory bodies such as the GMC, as well as any relevant information already held in relation to the person from any previous referrals. This could provide evidence of cumulative behaviour indicating a safeguarding risk.

The type of information the DBS would expect to see in support of a referral from an employer might include:

- Minutes of disciplinary hearings;
- Witness statements;
- Dismissal/suspension letter;
- Adult social care or children's service's records in relation to any safeguarding investigation; and
- Details of any police involvement.

This list is not exhaustive. For further guidance on completing the DBS referral form and documentary evidence required, please refer to the guidance on referrals which can be found on the DBS website.

If you are a regulated activity provider, or if you are requested to provide prescribed information to the DBS, you must provide this information by law.

The DBS referral form and guidance is available on the DBS website at:

www.gov.uk/government/publications/dbs-referrals-form-and-guidance.

The DBS will require all information held up to the point of the referral being made. When making a referral, the DBS would ask that they are signposted to any other organisations involved so that they can seek any additional information directly from those sources.

The DBS have provided a fact sheet about when to refer which is available on their website at:

www.gov.uk/government/dbs-factsheet-01.pdf

How long does a barring decision last?

If the DBS bars a person from working in regulated activity with either children or vulnerable adults, the bar will extend to the life of the person.

However, a barred person also has the right to request a review of the DBS' decision after a minimum barred period. The minimum barred period is dependent on the age of the barred person at the point when they became barred. The minimum barring periods are as follows:

- Aged under 18 when barred - 1 year
- Aged 18 to 24 when barred - 5 years
- Aged over 24 when barred - 10 years

All requests for review must be made in writing to the DBS. The DBS can only agree to a review a barred person's case after the minimum barring period has elapsed, and only if the person can demonstrate that their circumstances have changed in such a way that they no longer pose a significant risk to children and/or vulnerable adults.

The DBS also has the power to review a person's inclusion on the DBS Barred Lists at any time where:

- Information becomes available which it did not have at the time of the person's inclusion in the list
- There has been a change of circumstances relating to the person, or
- An error has been made by the DBS (ISA)

It should be noted that the ability to review a barring decision at any time is a power given to the DBS under law. The power to review at any time does not give a barred person a right to have their case reviewed by the DBS. Also, while the DBS may review cases at any time due to the circumstances above, it does not guarantee that a barring decision will be revoked at the end of the review. A person will only be removed from either the children's or adults barring list if the DBS is satisfied that it is not appropriate for the person to remain barred.

See the factsheet on reviews on the DBS website at:

www.gov.uk/government/dbs-factsheet-8.pdf

What is the appeals process?

The Safeguarding Vulnerable Groups Act 2006 and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 set out the conditions under which a person can appeal against a barring decision made by the DBS or, to appeal against a refusal to remove a person following a review. See the DBS factsheet on appeals at: www.gov.uk/government/db-factsheet-9.pdf

What is the harm test?

The Harm test is satisfied on occasions where a person may not have engaged in relevant conduct but there are still serious concerns which satisfy the harm test. It is likely to be met where a person has communicated something about their thoughts, beliefs or attitudes to indicate they pose a risk of harm directly in relation to vulnerable groups (rather than a general risk to all people). The 'Harm Test' will not usually be met when the person's expression of his / her beliefs indicates a general risk of harm rather than a specific risk to vulnerable groups.

For a case to be considered as a risk of harm, relevant conduct would not have occurred but there must be tangible evidence rather than a "feeling" that a person represents a risk to children and / or vulnerable adults.

The focus of the DBS role is safeguarding concerns, you may be required to refer misconduct/performance issues to other organisations if there is no safeguarding concerns.

What steps do the DBS take when making a decision?

Once a regulated activity provider has permanently removed a person from regulated activity through dismissal or permanent transfer from regulated activity (or would have if the person had not left, resigned, retired or been made redundant), the process is as follows:

- Any referral made to the DBS must be done by using the DBS referral form. Local authorities, keepers of registers or supervisory authorities may submit referrals in other formats but are encouraged to do so using the DBS referral form.
- The completed and signed referral form, supporting evidence and documents should be posted to the DBS. The DBS will acknowledge the referral within three working days of receipt. The case will be given a unique reference number and is passed to the DBS caseworkers to be handled in accordance with their decision making processes.
- After the DBS receives a referral it will typically be processed through a five-stage decision making process. See the DBS factsheet on thereferral and barring making decision at: www.gov.uk/disclosure-and-barring-service-criminal-record-checks-referrals-and-compliants

Who does the DBS share information with?

It must be recognised by any party providing information to the DBS that it may be necessary for information to be disclosed by the DBS to another party. This may include (but may not be limited to):

- The individual themselves
- The police
- A relevant authority (e.g. probation/prison service)
- A supervisory authority (e.g. CQC)
- A Keeper of Registers (e.g. GMC, NMC).

The DBS will only disclose information to any party where:

- There is a legal duty to do so
- In response to a request for subject access made by a person
- To allow a person to provide representations against information which the DBS intend to rely on when barring a person
- A Keeper of Registers, e.g. the GMC requiring the disclosure of information under their legislation for fitness to practice case.

Where a legal power exists, the DBS will consider the disclosure of information and will normally only disclose information for the purposes of safeguarding children or vulnerable adults.

Whenever a disclosure is made to the DBS, the person or organisation providing the information should be aware that, under normal circumstances, the DBS will not contact them for permission to further disclose information. However, it is recognised that there may be occasions where information is particularly sensitive and the release of information may jeopardise:

- The prevention/detection/investigation of crime
- The apprehension/prosecution of offenders, or
- The safety/security /liberty/welfare of children or vulnerable adults.

Normally the sensitivity relating to the disclosure of information is time limited e.g. where a police investigation has not yet been concluded. It is important that the DBS is aware of any concerns relating to the disclosure of information in cases of particular sensitivity such as those outlined above. In such cases, any party disclosing information to the DBS will need to highlight any concerns about its sensitivity. This will allow the DBS to contact the person / organisation who disclosed the information to gain a better understanding of any concerns and make an informed decision whether the information may be disclosed.

See factsheet on data protection and security on the DBS website at:

www.gov.uk/government/dbs-factsheet-06.pdf

Further information

Further information about duties to refer, the process, relevant offences and further training and support offered by the DBS can be found on their website at:

www.gov.uk/government/disclosure-and-barring-service or by telephoning or emailing the DBS helpline as indicated below:

Barring information helpline

Tel: 01325 953795
or email: dbsdispatchteam@dbs.gsi.gov.uk

Disclosure information customer services

Tel: 0870 90 90 811
or email: customerservices@dbs.gsi.gov.uk

NHS Employers

The NHS Employers organisation is the voice of employers in the NHS, supporting them to put patients first. Our vision is to be the authoritative voice of workforce leaders, experts in HR, negotiating fairly to get the best deal for patients.

We work with employers in the NHS to reflect their views and act on their behalf in four priority areas:

- pay and negotiations
- recruitment and planning the workforce
- healthy and productive workplaces
- employment policy and practice.

NHS Employers is part of the NHS Confederation

Contact us

For more information on how to become involved in our work, email getinvolved@nhsemployers.org

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