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Reform of the DBS Filtering System:

Understanding the impact of the Home Office proposals in response to the Supreme Court judgement in the case of P and Others vs SSHD and SSJ

28 July 2020

1. Background

On 30th January 2019, Lord Sumption outlined the majority verdict (four to one) of the Supreme Court in the case of P and Others vs SSHD and SSJ. These cases examined the systems that govern the disclosure of criminal records to employers and other organisations under the both the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in 2013) and The Police Act 1997 (Criminal Records) (Amendment) Regulations 2013. The current filtering rules are:

For adults

An adult conviction will be removed from a DBS certificate only if:

- 11 years have elapsed since the date of conviction
- It is the person's only conviction
- Conviction did not result in a custodial or suspended sentence
- Conviction does not appear on the list of specified offences

An adult caution will be removed after six years have elapsed since the date of the caution as long as the offence does not appear on the list of specified offences. There is no limit to the amount of cautions that can be filtered.

For juveniles

A juvenile conviction will be removed from a DBS certificate only if:

- Five and a half years have elapsed since the date of conviction
- It is the person's only conviction
- Conviction did not result in a custodial or suspended sentence
- Conviction does not appear on the list of specified offences

A youth caution, reprimand or final warning will be removed after two years have elapsed since the date of the caution as long as the offence does not appear on the list of specified offences. There is no limit to the amount of youth cautions, reprimands or final warnings that can be filtered.

The legal challenge

The case concerned roles and activities that are exempt from the ROA 1974 which require the disclosure of all cautions and convictions that are not 'protected' in accordance with the filtering rules outlined above, in order to assess an applicant's suitability for some particularly sensitive occupations or activities such as protecting children and vulnerable adults; or membership of professions that require particularly high levels of integrity and public confidence (e.g. certain legal, financial, security or civil service roles).

In these instances, the applicant ***must tell the truth*** when asked to disclose their criminal record; and a certificate recording these cautions and convictions is issued by the Disclosure and Barring Service (DBS) upon application.

The operation of both statutory schemes is mandatory. If the conditions for disclosure are satisfied then disclosure must be made – **there is no discretion**.

The respondents in the case argued that the statutory schemes that mandate disclosure of their criminal records, as it is currently, framed have made it more difficult for them to get a job, or will make it more difficult for them to obtain work in the future. They argued that the schemes operate in a way that is unfair to them and is inconsistent with their Article 8 right to a private life under the European Convention of Human Rights. It was not disputed that the disclosure of a criminal record does indeed invade an applicant's private life and so it can only be justified by reference to some broader social purpose.

The judgment

The Supreme Court dismissed the government's appeals except for the case of W (which related to a person receiving a conditional discharge order for ABH at age 16), but they did so on much narrower grounds than the Court of Appeal.

Lord Sumption was very clear when he delivered the majority verdict on behalf of the Supreme Court:

"It should be emphasised that the great majority of cases where criminal convictions must be disclosed involve much more serious offending than these cases and are unlikely to affected by today's judgment .

Lord Sumption explained that, under Article 8 of ECHR, in order to justify an inference with a person's private life, two conditions must be satisfied:

1) The interference must be in accordance with law
2) The law in question must be necessary in a democratic society for some legitimate purpose such as: public safety; the prevention or disorder of crime; the protection of the rights of others.

At its most basic, 'in accordance with law' means that there must be a legal basis for disclosure, which in these cases is clearly for provided for by statute: the ROA Exceptions Order 1975 (as amended in 2013) and the Part V Police Act 1997. In addition, it also refers to the quality of law that authorises the disclosure of criminal records to employers and other organisations.

Lord Sumption stated *"It must be **accessible and foreseeable** in its impact on the individuals affected. To be accessible, it must be publicly available and capable of being understood. To be foreseeable, its application **must not depend on the discretion of those who apply it unless that discretion is subject to clear principles which enable its impact in any given case to be predicted – if necessary with the aid of legal (or professional) advice".***

The Court acknowledged that the two statutory schemes are complex, but also that they are entirely clear in their effect and are not subject to the discretion of those whose job it is to apply them (i.e. the police or DBS), so they are in accordance with law.

The Supreme Court did not accept that there needed to be a system of individual review in England and Wales for the following reasons(see sections 51-54):

1. Decisions about the relevancy of a candidate's convictions to suitability for a particular role should be that of an employer, usually in discussion with the

candidate. In order to discharge this responsibility with thoroughness required by the public interest, employers need access to potentially relevant information about a candidate's past.

The Judgment states, *"First, it is entirely appropriate that the final decision about the relevance of a conviction to an individual's suitability for some occupations should be that of the employer. Only the employer can judge whether the particular characteristics of the particular job make it inappropriate to employ the particular ex-offender. Very often, this will be a judgment that the employer makes in the course of discussion with the candidate in the light of what is disclosed. The employer will bear the responsibility for the consequences of its choice, and in sensitive appointments the responsibility may be a heavy one.*

"In order to discharge that responsibility with the thoroughness that the public interest requires, the employer must have access to potentially relevant information about a candidate's past. He may end up by disregarding some or all of it as irrelevant or insufficiently weighty. But unless the decision is to be taken out of his hands, he must be told about any criminal record which might reasonably influence him, even if further consideration or discussion of the circumstances with the candidate may ultimately cause him to disregard or attach limited weight to it.

"By comparison, the administrative authorities responsible for disclosure know only (i) the job title, which usually gives only the most general notion of what the job entails; and (ii) the broad category of offence for which the candidate was convicted or cautioned, the implications of which may be affected by a wide variety of mitigating or aggravating circumstances that are not apparent from the criminal record database.

"A system of administrative review on the application of the candidate may be possible. It has existed in Northern Ireland since 2016. Such a system enables the disclosure authority to take into account the candidate's representations. But it cannot enable the authority to take over the employer's function of assessing the candidate's suitability for the particular employment. It might be possible to design a system under which rather more information about the job was supplied to the disclosure authority than is provided for under the forms currently prescribed. It might be possible to design a system under which the disclosure authority could call for further information from the employer, but that would give the game away. The employer would know that there was something there, and the consequence for the candidate would in many cases be worse than disclosure of what might turn out to be a very minor offence.

"None of these possibilities can realistically be thought to displace the employer's judgment of the candidate's suitability. It follows that it cannot be right to say that as a matter of law the United Kingdom must have a scheme of disclosure which depends on an examination of the circumstances of individual cases by someone other the employer."

2. There is limited empirical evidence that employers cannot be trusted to take an objective view and no evidence that the DBS Code of Practice is ignored on a significant scale. **The risk that *some* employers may be too risk-averse is not enough to deny *all* employers the ability to assess relevancy**.

3. Candidates must know what they need to disclose at the time of completing the DBS application form (or self disclosure request from the employer) and the DBS certificate **must substantially correspond to the information required under the scheme of self-disclosure**. Any advantages of a review system are at the expense of foreseeability, which is at significant cost to the candidate. Lady Hale made the point that it would make no sense for the applicant to make a self-disclosure only to

find that the authorities involved in a case-by-case review decide to disclose/not to disclose the information on the certificate.

4. A review system is impractical due to the sheer volume of DBS applications in England and Wales (over 4 million enhanced DBS certificates each year).

Lord Sumption concluded:

"Taking these considerations together, they suggest that although it may be possible to abandon category-based disclosure in favour of a system which allowed for the examination of the facts of particular cases, there would be a cost in terms of protection of children and vulnerable adults [and other business related risks], foreseeability of outcome by candidates, consistency of treatment, practicality of application, and delay and expense, without necessarily achieving much more for ex-offenders than the current system."

When considering whether the legislation draws the boundaries of the relevant categories in an acceptable place, the Court considered that the current schemes had been carefully devised to balance the competing public interests in: rehabilitation; safeguarding; practicability.

The Court concluded that there were only two aspects of the existing regime that were disproportionate:

1. **The multiple conviction rule:** having more than one conviction does not, on its own, indicate propensity to reoffend as the current application of the rule does not consider nature of the offences, similarity, number or time intervals between offences.

2. **The disclosure of reprimands and final warnings administered to under-18s:** a caution to an adult requires consent. However, a reprimand or final warning given to a young offender requires no consent and does not involve the determination of a criminal charge. In Lord Sumption's view the inclusion of reprimands and final warnings among offences which must be disclosed is a category error, and as such an error of principle. Importantly, although Lord Sumption detailed that he would expect the same to be true of the current regime governing youth cautions, he acknowledged the Court were not addressed on that question and it was neither necessary nor appropriate to decide it within the appeal.

Key principles of the judgment

In our view, when outlining that the principles of accessibility and foreseeability, the Court was clear that **certainty** is in the interests of all parties.

- The individual **must know** what they are required to disclose when applying for a role (understanding their disclosure rights and responsibilities for their chosen profession by accessing publicly available guidance and support from professional advisers);

- The individual **must tell the truth** when asked to disclose a question about their criminal record (for roles covered by ROA 1974 and roles subject to the ROA Exceptions Order);

- If the employer or education provider wants to know about the person's criminal record then they **must ask** and **signpost the applicant to where they can receive confidential advice** on how to answer the question correctly (e.g. Nacro, DBS Customer Services);

- The employer **must give applicants a fair opportunity to provide accurate context** surrounding their criminal record (self-declaration, written disclosure statement, risk assessment interview);

- If the role or activity is exempt from the ROA 1974 then the employer or education provider **must inform the applicant** prior to their application and **demonstrate how the application is eligible** for a standard or enhanced DBS check;

- The employer or education provider **needs to have a clear responsible recruiting safely and fairly policy that complies with DBS Code of Practice, DPA and HRA 1998** (carry out the right level checks for the role and have in place an effective process for determining risk, relevance and rationale – ensuring the applicant is fully aware of the consequences that their criminal record may have on their application);

- The DBS **must produce** a certificate (basic, standard, enhanced, or enhanced and barred list check) upon application that corresponds with the criminal record information that the applicant is required to provide through self-disclosure;

- The government **must ensure that any guidance published** on the disclosure rules (ROA 1974 roles, standard or enhanced DBS role and security vetting roles) **is clear and capable of being understood** (e.g. the full effects of the multiple conviction rule including the impact of relevant orders and the legal requirement for applicants to disclose, motoring convictions, military convictions and other offences that are not recorded on PNC). For roles subject to the ROA Exceptions Order, the person must know which offences they must disclose to the employer prior to what they need to disclose at the time of completing the DBS application form (or self - disclosure request from the employer) and the DBS certificate **must substantially correspond** to the information required under the scheme of self-disclosure.

2. Home Office Proposals

The draft orders will amend relevant provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the Police Act 1997, by removing disclosure for exempt roles for:

1. Youth cautions, reprimands and final warnings
2. All convictions where a person has more than one conviction (assuming they meet other filtering criteria) except for custodial sentences (including suspended custodial sentences) and convictions for offences contained on DBS list of specified offences.

3. Implications of Home Office Proposals

1. Some convictions may be disclosed on a basic check for longer than they would be on a standard/enhanced DBS check.

Our understanding is that there are no plans in the proposed DBS operational process requiring a conviction to be spent before it becomes eligible to be filtered from a standard or enhanced (hereafter 'higher level') DBS certificate.

Any employer is entitled to ask applicants for a self declaration of unspent convictions (or conditional cautions) for any role, as a minimum. This means that, when applying for an ROA-exempt role, applicants may be required to disclose more information to employers and other organisations under self-disclosure than would be disclosed by DBS on a higher level DBS certificate.

It also means that some conditional cautions and convictions may be disclosed on a basic DBS certificate for longer than they appear on a higher level DBS certificate.

As highlighted in Appendix 1, when applying for an exempted post, an individual has to apply the following in order to determine whether a caution, conviction, final warning or reprimand are disclosable:

Step 1 – Is the caution or conviction spent? If no then the information is disclosable and not subject to any further process. If yes, then s.4 (2) and/or Art.2 Rehabilitation of Offenders Act 1974 applies i.e. information is only disclosed where an 'exception' exists and/or the ROA is disapplied under s.7 ROA.

Step 2 – Does the Rehabilitation of Offenders of Offenders Act 1974 (Exceptions) Order 1975 (as amended 2013) apply? i.e. Is the role an exempted position? Can an employer ask an exempted question and considered spent cautions and convictions when assessing suitability? If yes;

Step 3 – Is the spent conviction or caution eligible for filtering?

Our understanding is that DBS current practice does not apply steps 1 and 2, which are intrinsic to the disclosure process. As a consequence, filtering as applied by the DBS does not currently take into account whether a caution or conviction is spent. If applying the Exceptions Order in isolation then this creates the impression that unspent convictions and cautions can become protected and filtered . However, in our view, if the DBS process was to mirror that of the individual when establishing whether a caution or conviction is 'protected' then, by the very nature of this process, the conditions for filtering could only be applied to spent cautions and convictions.

Consider the following examples:

Case Study 1

In October 2009, John is convicted of common assault against his partner and receives a fine. Six months later, in April 2010, he is convicted of battery and receives a 1-year community order and a restraining order 'until further order' against his partner.

His convictions will be filtered from his enhanced DBS certificate after 11 years, so the common assault will be filtered in October 2020 and the battery will be filtered in April 2021.

The battery conviction will be unspent until he returns to court to request that the restraining order is ended.

In May 2021, John applies to work in a care home with elderly and vulnerable people. If the employer asks him to disclose any unspent convictions, he will need to disclose the battery conviction. Under the proposed DBS operational rules however, neither conviction will appear on his enhanced DBS certificate.

Simultaneously, he applies to be a delivery driver for his local supermarket, which requires a basic DBS certificate. Again, John would need to disclose the conviction for battery and this conviction will appear on his basic DBS certificate.

Case Study 2

Peter (aged 17) receives a youth conditional caution for common assault against a fellow pupil at his college and is required to complete an anger management course, after which the caution will be considered spent.

He is now in the process of applying to university to study Health and Social Care and is required to disclose 'relevant unspent cautions and convictions and which include offences against the person. As part of the course he will be required to undertake a placement. On applying to the university he is required to disclose his youth conditional caution in response to the general criminal record question due to it becoming spent under ROA after three months. However, because of the course applied for he is required to complete a further declaration and provide consent for an enhanced DBS certificate to be obtained. This form only requires the disclosure of criminal record information that is not considered 'filtered'. At this stage he is not required to disclose his youth conditional caution nor can the university consider this information to assess suitability as it will be considered 'protected' and filtered.

The information will not appear on the DBS certificate. However, the university will be aware of this information as they have made a lawful requirement for the information to be disclosed at an earlier stage of the process.

How can organisations have confidence in a disclosure scheme that may require a person to disclose more information for a role such as retail (subject to ROA 1974) than they do for a role where they are caring for children or vulnerable people (subject to ROA Exceptions Order)?

2. Convictions dealt with in the same proceedings will/will not be filtered if one of those convictions is on the non-filterable offences list

Consider the following case study:

Case Study 3

At the age of 17, Alison is convicted of a number of offences in the same court proceedings. Her record looks like this:

Conviction		Date of Conviction	Disposal
1		13 AUGUST 2006 HIND, ALISON Offence:	
	1	POSSESSION OF A CLASS A DRUG ON 12 DECEMBER 2005	REFERRAL ORDER 6 MONTHS
	2	POSSESSION OF A CLASS B DRUG ON 12 DECEMBER 2005	REFERRAL ORDER 6 MONTHS
	3	ASSAULT OCCASIONING ACTUAL BODILY HARM ON 12 DECEMBER 2005	REFERRAL ORDER 6 MONTHS TO RUN CONCURRENTLY

Under the proposed amendments to the multiple conviction rule, it is not clear whether or not these convictions will be filtered from Alison's standard or enhanced DBS certificate. The possession offences are eligible to be filtered after 5½ years, but ABH is on the list of ineligible offences.

The scenario above presents numerous challenges and complications for both individual and organisation. From the organisation's perspective, if the drugs offences are all filtered, but not the ABH, then the individual may not be required to self-disclose potentially relevant information about their offences and the true circumstances relating to the incident to an education provider, employer or regulatory body.

From the individual's perspective, a person could have many offences within a single proceedings which may be filtered that **may never qualify** for filtering due to a single offence, which may be minor (e.g. absolute discharge order for ABH).

Compare the scenario above to that of Dan, who was convicted of the same offences, but in separate proceedings. His record looks like this:

Conviction		Date of Conviction	Disposal
1		13 AUGUST 2012 COLLINS, DAN Offence:	
	1	POSSESSION OF A CLASS A DRUG	REFERRAL ORDER 3 MONTHS
2		22 OCTOBER 2013 Offence:	
	1	POSSESSION OF A CLASS A DRUG	REFERRAL ORDER 6 MONTHS
3		02 APRIL 2014	
	1	ASSAULT OCCASIONING ACTUAL BODILY HARM	YOUTH REHABILITATION ORDER 12 MONTHS

Dan's drug convictions will be filtered after 5 ½ years, leaving only the ABH conviction on his standard or enhanced DBS certificate.

3. On an enhanced DBS certificate, the police may/may not disclose potentially relevant information that has been filtered, which creates uncertainty for the applicant and organisation.

During an enhanced DBS application process, the police have the opportunity to disclose any information that they reasonably believe is relevant to the role/workforce applied to. This provision was explored in depth during the Bichard Inquiry following the murders of Holly Wells and Jessica Chapman by Ian Huntley, in Soham.

Currently, less than 0.1% of enhanced certificates disclose police intelligence, but we anticipate this may increase as the scope of the filtering regime broadens. This creates uncertainty for the applicant, who will have already made their criminal record declaration omitting filtered offences, and the organisation who has made their initial suitability decision based on the criminal offences disclosed by the individual.

Case Study 4

Dillan is convicted of a string of minor offences in his youth, all of which are eligible to be filtered after 5 ½ years. In his mid-20s, he applies to work with young people and is asked to apply for an enhanced DBS certificate. He completes the declaration form, answering 'no' to the question of whether he has any cautions or convictions which cannot be filtered.

However, the police write to him explaining that they are proposing to disclose his juvenile convictions on his enhanced certificate.

How does this fit with the key principles of the Supreme Court Judgment, in particular the principles of accessibility and foreseeability?

4. The proposals relating to the multiple conviction rule could result in potentially relevant information about suitability not being shared with organisations

We completely endorse the position that having more than one conviction does not, on its own, indicate propensity to reoffend. However, the key factors that organisations should consider when carrying out a criminal record risk assessment to determine suitability for the role are:

- Nature and seriousness of the offence
- Relevancy of the offence(s) to the role
- Length of time since the last offence
- Pattern of offending
- Age at the time of first/last offence
- Circumstances of the offence(s)
- Attitude to the offence(s) – then and now
- Efforts made to address past issues; not re-offend; make a change for the better
- Change in circumstances and responsibilities taken on

The proposed amendment to the multiple conviction rule means that there is no limit on the number of offences a person may have been convicted of that qualify for automatic filtering.

In our view, this fundamentally removes the ability of the employer (or regulatory body) to apply the vast majority of the factors above, diminishing their ability to carry out an accurate or effective risk assessment.

Following initial conversations with some organisations about the proposed changes to the filtering regime, they felt less confident in both disclosure schemes (self-disclosure and criminal record checks). They expressed concern about being able to adequately assess the information (or lack of information) provided by the applicant; and the information disclosed on DBS certificates.

Consequently, some of these employers that have effective safe and fair recruitment policies and practice in place may feel they have no choice other than to apply a zero tolerance approach to applicants with criminal records.

Other organisations that already operate a zero tolerance approach to applicants with criminal records (which in our view is unlawful) will continue to apply this practice, particularly during these most challenging times when unemployment levels continue to rise.

With the pressure on educational providers to obtain income from student fees, it is also possible that some students may be accepted onto educational courses where they have limited prospects of entering a regulated profession, or face barriers accessing employment after registration.

Consider the following example:

Case Study 5

Andy has a long history of alcohol-related offending. He was first convicted at the age of 17. His record looks like this:

Conviction		Date of Conviction	Disposal
1		02 FEBRUARY 2008 GREEN, ANDREW Offence:	
	1	SHOPLIFTING	REFERRAL ORDER 4 MONTHS
	2	DRUNK AND DISORDERLY CONDUCT	REFERRAL ORDER 4 MONTHS (CONC.)
2		12 OCTOBER 2008	
	1	USING THREATENING/ABUSIVE LANGUAGE	YOUTH REHABILITATION ORDER 6 MONTHS
	2	ASSAULT AGAINST A POLICE CONSTABLE	
3		05 JUNE 2009	
	1	COMMON ASSAULT	FINE £345
	2	SHOPLIFTING	COMPENSATION ORDER £150
	3	SHOPLIFTING	
	4	USING THREATENING/ABUSIVE LANGUAGE	
4		27 SEPTEMBER 2009	

	1	DRIVING A VEHICLE WITH EXCESS ALCOHOL	DISQUALIFICATION FROM DRIVING 12 MONTHS; FINE £400
5		22 DECEMBER 2010	
	1	DRIVING A VEHICLE WITH EXCESS ALCOHOL	DISQUALIFICATION FROM DRIVING 24 MONTHS; FINE £1500
6		08 MAY 2013	
	1	COMMON ASSAULT	CONDITIONAL DISCHARGE 12 MONTHS
7		19 SEPTEMBER 2017	
	1	DRIVING A VEHICLE WITH EXCESS ALCOHOL	DISQUALIFICATION FROM DRIVING UNTIL FURTHER TEST; FINE £1500

Now in his late 20s, he is applying to work in the care sector and will be responsible for dispensing medication and caring for vulnerable adults, some of which display challenging behaviour. Of the 12 offences he committed while under the influence of alcohol, only the last two will be disclosable to his prospective employer. Although Andy has a propensity to commit offences whilst drunk, including those against other people and has done so over a period of 9 years, this would not be apparent to the employer based on the scant information that would be disclosed.

Similarly, a person may have a pattern of dishonesty or fraud-related offences that would not be apparent to a prospective employer considering them for a wealth management role which may be eligible for only a standard DBS certificate, for example.

The Supreme Court was abundantly clear (sections 51 -54 of judgment) that only the employer can determine the risk and relevance of a particular applicant with a criminal record, but if many of the offences in the cases above are all filtered then the organisation is most certainly prevented from obtaining potentially relevant information via self disclosure about the applicant's offending behaviour during a particular incident.

Important note

There is no legal requirement for an organisation to carry out a DBS check. Many organisations including regulatory bodies and other purposes only require self-disclosure. The legal, financial and security sectors; and also other roles where an individual is carrying out activities mentioned in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 are only eligible to carry out standard DBS checks.

In adult social care environments, anyone who engages ONCE or more in regulated activity (as defined under the Safeguarding Vulnerable Groups Act 2006) is eligible for an enhanced DBS check with an adults' barred list check.

Anyone who carries out any type of work that is **not** regulated activity, but which gives them the opportunity to have contact with vulnerable adults four times or more in a 30-day period or between 2am and 6am, or at least once a week on an ongoing basis, is eligible for an enhanced DBS check without an adults' barred list check. This can apply to ancillary roles such as housekeeping, administration, catering and maintenance staff.

Anyone who works less often but has the opportunity for contact with people who need care and support during their work would be eligible to be asked to apply for a standard DBS check.

For example:

Martine is a cleaner in a care home working two days a week.

Because Martine has opportunity for contact with adults living at the care home through the course of her duties, and because she works there at least once a week on an ongoing basis, Martine is eligible for an enhanced DBS check without an adults' barred list check.

Bryan is a maintenance worker for the same care home. He only works at the establishment two days each month.

Because Bryan works at the care home less than four times in a 30-dayperiod, even though he has opportunity for contact with the people who live there in the course of his work, Bryan is eligible for a **Standard DBS check**.

4. Questions/issues for clarification

1. Youth cautions for sexual offences result in the individual being placed on sex offenders register. This may be potentially relevant information for an employer, education provider or regulatory body to know during the period of time that the individual is on the register. What is the proposed policy on the disclosure of recent youth cautions for relevant offences?

2. Will youth conditional cautions continue to be subject to disclosure on basic DBS checks for three months or until caution ceases to have effect (if earlier)?

3. If an applicant self-discloses a youth caution or multiple convictions that would be subject to automatic filtering, an organisation is likely to make a decision without applying for the DBS certificate. The organisation could argue that based on the Supreme Court Judgment the information is relevant to their decision, regardless of whether it is disclosed by the police. Could an organisation challenge the police for omitting potentially relevant (albeit, protected) information on enhanced DBS certificate?

4. Will applicants continue to be required to disclose motoring convictions, military convictions etc.? Some of these convictions may not appear on DBS certificate.

5. Will the DBS guidelines on handling certificate information need to change in light of these proposals?

6. Will the filtering rules apply to overseas applicants? If so, would the employer be required to disregard offences that appear on an overseas certificate/certificate of good conduct that might be otherwise be disclosed by the police on an enhanced disclosure?

7. Do the proposed rules apply to security vetting checks (e.g. prison service, certain police vetting roles) which are not subject to enhanced DBS checks and disclosure of police intelligence? If so, would these organisations be required to disregard offences that would be subject to automatic filtering rules?

8. Are there any planned changes to the QAF or Common law disclosure scheme to take into the impact of multiple conviction and youth cautions?

9. Are there any planned changes to the DBS list of specified offences?

10. What if someone has been dismissed or subject to disciplinary proceedings which led to them receiving a caution or conviction for offence which is now protected? Would they still be required to disclose the dismissal/sanction? Can the body still take this information into account e.g. if shared in a reference or the matter was is in the public domain (e.g. fitness to practice hearing)?

11. Will government guidance on risk assessment factors change in light of proposed changes? If not, can government outline how organisations can effectively apply these factors?

12. It is possible that the information on a DBS certificate could be subject to frequent change as offences become automatically filtered. How will the DBS Update Service reflect these changes?

13. Will government engage with regulatory bodies to ensure they do not compel applicants or members to disclose offences that are filtered; or sanction members based on historic offences that would now be filtered?

14. Some roles maybe subject to both basic DBS checks and standard/enhanced DBS checks e.g. University lecturer who then starts to work in schools, financial services, tradesmen working in different environments, which supports the argument for the new filtering rules to take into account ROA 1974.

15. The government announcement on the filtering changes stated that the scheme will ensure will ensure that vulnerable people are protected from dangerous offenders, but it is important to note that not all roles that involve access to vulnerable groups are eligible for enhanced DBS checks e.g. PAs and some ancillary social care roles, some NHS roles. How will government ensure that potentially relevant information will be shared with organisations where the role is not eligible for enhanced DBS checks?

16. Some agencies that supply staff working with children or vulnerable groups may not have access to sufficient information to the determine suitability of a candidate if they cannot obtain an enhanced DBS certificate.

5. Outstanding Issues with the Filtering System

There are number of other issues with filtering system which were identified within the Law Commission's Report (2017), but are outside the scope of the legal challenges brought before the Supreme Court:

1. There are currently two lists in legislation of offences which are always ineligible, as well as the DBS operational list and another the DBS have published for DBS applicants. There are numerous inconsistencies between these lists, making it virtually impossible for applicants (and advisers) to know definitively whether certain offences will be disclosed on DBS certificates, resulting in over- and under-disclosure to employers.

2. Inaccuracies in the operational list used by DBS mean that some convictions and cautions could be wrongly disclosed or wrongly withheld. It also follows that there is no channel for complaining that an offence has been wrongly included as the DBS can only check against the operation list, which is inaccurate.

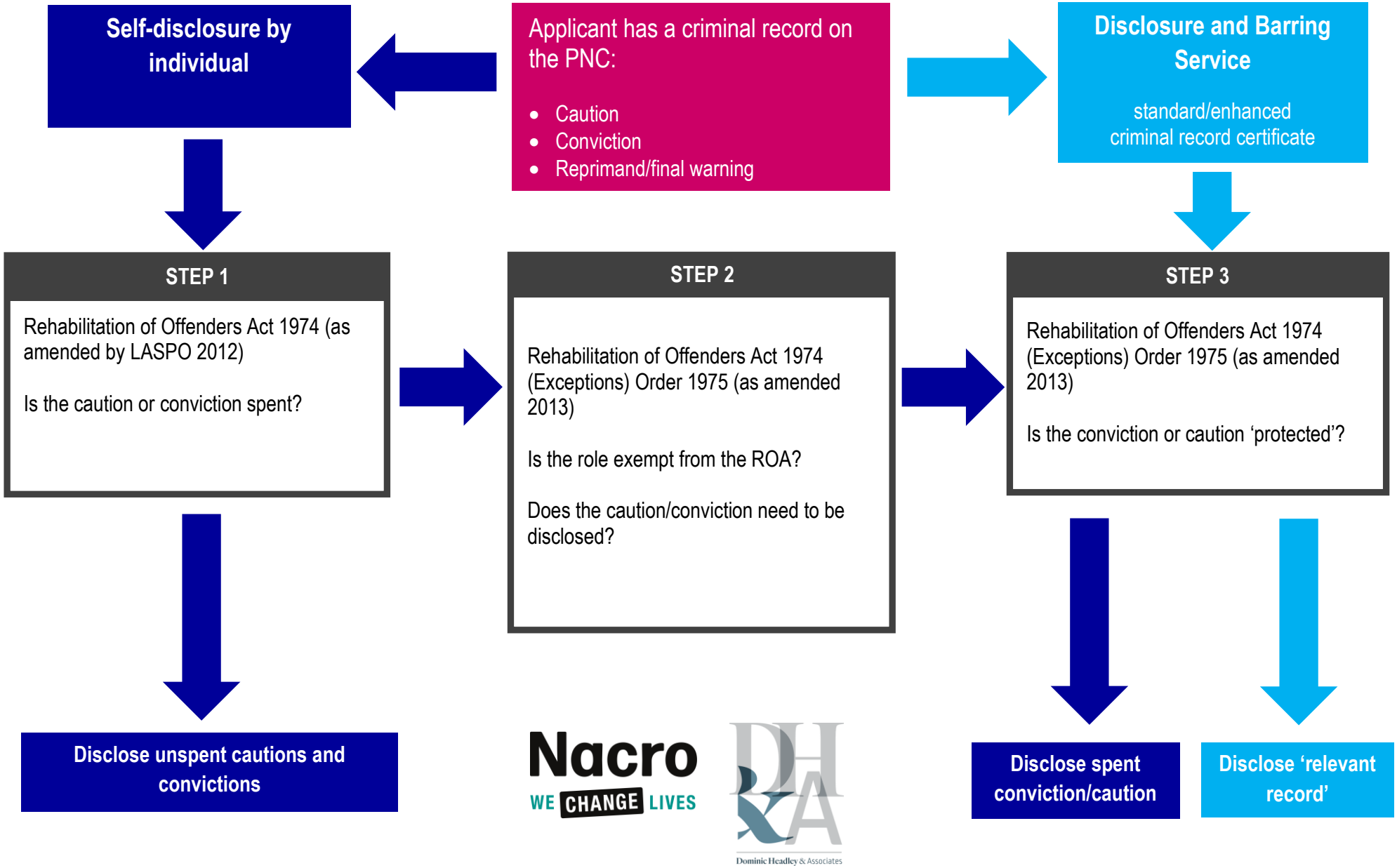
3. Some of the offences that are ineligible to be filtered relate to offences in Scotland or Northern Ireland, but contain some offences which can be committed in England and Wales. It is not clear whether this means that these offences are also non-filterable when committed in England and Wales.

4. There are inconsistencies in the way in which foreign offences and service offences are treated under the current filtering regime.

6. Relevant links

- Oral submissions of the three day hearing (19th – 21st June 2018);
- R (on the application of P) (Appellant) vs Secretary of State for the Home Department and others (Respondents) Full Judgment ;
- The Codes of Practice for England and Wales (2009 and 2015); and Northern Ireland (2018)
- Quality Assurance Framework (QAF) version 9 and DBS applicants introduction to QAF decision making process;
- Law Commission review on Criminal Records Disclosure ;
- MoJ guidance on Rehabilitation of Offenders Act 1974 (ROA);
- Nacro's Recruiting safely and fairly: a practical guide to recruiting ex-offenders;
- Nacro's Practical guidance on DBS filtering ;
- Nacro's guidance on Rehabilitation of Offenders Act 1974 (ROA);
- The Lammy Review (relevant sections) and Government response;
- Review of the Youth Justice System in England and Wales by Charlie Taylor (relevant sections) and Government response;
- Disclosure of Youth Criminal Records inquiry by Justice Select Committee (relevant sections) and Government response;
- Criminal Records Bill (private members' bill presented by Lord Ramsbotham;
- Criminal Records (Childhood Offences) Bill 2017-2019 presented by Theresa Villiers

Appendix 1
Self disclosure vs. DBS disclosure



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