

Employment Vetting Timothy Pitt-Payne¹

1. Recruitment decisions are difficult. Time and information are limited; yet a mistake can be expensive, sometimes disastrous. Local government employers will be acutely aware of the need to avoid unlawful discrimination in recruitment, and to promote equality of opportunity.
2. Recruitment has a positive and a negative aspect. In positive terms, employers are trying to identify the best candidate for the job from those available. There are a wide range of techniques available: e.g. structured written application forms, selection exercises, or psychometric testing. These are primarily forms of assessment rather than vetting.
3. In negative terms, employers are seeking to avoid appointing any candidate whose employment would be unlawful, or who risks causing serious harm to the organisation or its service users. Employment vetting is about the techniques that can be used to achieve this negative objective. Some forms of vetting are carried out by employers at their own discretion, while others are required by statute. Some methods are inadvisable, or even unlawful.
4. This paper discusses:
 - the use of references;
 - CRB checks;
 - statutory banning lists for particular kinds of work;
 - the work of the Independent Safeguarding Authority;
 - recruitment blacklists; and
 - personal information available on the internet.

¹ For further discussion of the issues in the paper, and of information law generally, see 11KBW's Information Law blog at <http://www.panopticonblog.com/>

5. The paper does not discuss immigration law issues, and the need to ensure that prospective employees are entitled to work in the UK.

REFERENCES – ASSESSMENT OR VETTING?

6. References are used in different ways. Some employers use them as part of the assessment process, informing their decision as to which candidate best meets the requirements of the job. References are taken into account at the selection stage, alongside other forms of evidence. In the public or voluntary sector, however, references are often used in a more limited way: a provisional decision is made to appoint a particular candidate, and then references are taken up for that candidate. Where this approach is taken, seeking references is a form of employment vetting. The preferred candidate will be appointed unless their references give any serious reason for the employer to reconsider – e.g. evidence that the candidate has lied about their qualifications or experience.
7. There are potential legal liabilities on those who provide references. An employer owes a duty of care to the subject of the reference (*Spring v Guardian Assurance plc* [1994] ICR 596), and possibly also to the recipient (compare *Hedley Byrne v Heller* [1964] AC 465). For this reason, some employers have a policy of providing references only in very limited and factual terms (e.g. to confirm that the individual worked for them for a period of time, and perhaps to explain the circumstances in which the individual left). Even a reference of this limited kind has some value, as a check on the accuracy of the factual information provided by the candidate.
8. References are usually sought or obtained on an understanding that they will be confidential. Most references will be prepared on computer, and held on computer by the recipient; this means that they will come within the Data Protection Act 1998 (DPA). This provides individuals with a right of subject access (DPA section 7); that is, the right to obtain access to any personal information about the individual that is held by a data controller. Both the provider of a reference, and its recipient, are likely to be data controllers in relation to the relevant candidate. Can a candidate use a subject access request in order to obtain a copy of their references?
 - There is a specific provision in the DPA about those who provide references – though, as so often in that ill-drafted Act, the provision is easily overlooked. Employment references given in confidence by the data controller are exempt from the subject access right: see DPA

section 37, and Schedule 7 paragraph 1. So a candidate cannot use the right of subject access in order to obtain a copy of a reference from the person who provided it.

- There is no specific exemption relating to those who receive references. There is, however, a general provision about cases where a data controller cannot comply with a subject access request without disclosing personal data about an identifiable third party. The data controller is not obliged to comply with the request unless either the third party consents, or is it reasonable to comply without consent: DPA section 7(4). In practice this usually means that a candidate cannot use the right of subject access so as to obtain a copy of a reference from the person who receives it, without the consent of the provider.

CRIMINAL RECORDS AND CRB CHECKS

9. Should employers be able to find out whether prospective employees have a criminal record? And should they be able to find out other potentially relevant information held by the police? These are difficult issues of social policy. Individuals with criminal records should be able to re-integrate into society, provided that they serve any sentence and avoid re-offending; this will be very difficult if their record makes them unemployable for life. In a legal system based on the presumption of innocence, an individual usually ought not to be prejudiced by allegations that have been investigated by the police but have not led to a criminal conviction. On the other hand, there is a strong perceived need to protect both children and vulnerable adults against the risk of sexual, physical or financial abuse; this suggests that, when deciding who should be allowed to work with these groups, employers should have access to the widest possible range of information.
10. These issues are dealt with by the Rehabilitation of Offenders Act 1974 and by the Police Act 1997. The latter is the legal foundation for the Criminal Records Bureau (CRB). CRB checks will be very familiar to local authority employers, in particular in relation to education and community care.
11. The 1974 Act governs the extent to which employers can ask for information about criminal convictions.
 - Convictions are divided into two categories: unspent and spent. In general, convictions become spent at the end of a rehabilitation period, provided that the individual has served

any sentence and has not reoffended. The rehabilitation period will vary between three and ten years, depending on the severity of the sentence and the age of the offender, and will run from the date of sentence. Some convictions are excluded from rehabilitation: e.g. where the individual is sentenced to imprisonment for a term over 30 months, or for life.

- Any employer is entitled to ask candidates about their unspent convictions. This is so regardless of the nature of the job to which he is recruiting. Employers are free to reject candidates on the ground of unspent convictions; and they are also free to dismiss an employee for misconduct, if they subsequently discover that the employee lied about their unspent convictions when applying for the job.
- However, in general employers are not entitled to ask about spent convictions. Candidates may answer questions about convictions as if they referred only to unspent convictions (section 4(2)(a)). A spent conviction, or failure to disclose such a conviction, is not a proper ground for excluding a candidate from employment (section 4(3)(b)).
- There are complex exceptions to the 1974 Act. A 1975 Order² made under the section 4(4) of the Act allows employers to ask certain candidates about their spent convictions. This applies to certain work in relation to vulnerable adults³, and to work in a regulated position⁴.
- A vulnerable adult for this purpose is a person aged 18 or over who has a substantial learning or physical disability; a physical or mental illness or mental disorder, chronic or otherwise, including an addiction to alcohol or drugs; or a significant reduction in physical or mental capacity⁵.
- A regulated position⁶ includes:
 - a position whose normal duties include work in an educational institution, or various other sorts of institution for the care of children;
 - a position whose normal duties include work on day care premises;
 - a position whose normal duties include work on day care premises;

² The *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023)*, as subsequently amended.

³ See Schedule 1, Part II, paragraph 12 of the 1975 Order.

⁴ See Schedule 1, Part II, paragraph 14 of the 1975 Act.

⁵ See definition in Schedule 4 to the 1975 Order.

⁶ See definition in Schedule 4 to the 1975 Order, incorporating definition in section 36 of the *Criminal Justice and Court Services Act 2000*.

- a position whose normal duties include caring for, training, supervising or being in sole charge of children; and
 - a position whose normal duties involve unsupervised contact with children under arrangements made by a responsible person.
12. The CRB, set up under the Police Act 1997, provides a mechanism for employers to obtain access to conviction information, and also to other information relevant for employment vetting. The 1997 Act provides for the CRB to issue certificates giving three levels of disclosure (only two of which are currently available).
- Basic disclosure certificates. This covers an individual's unspent convictions only. Basic disclosure is not currently available from the CRB, though it is available from the equivalent Scottish body (Disclosure Scotland).
 - Standard disclosure certificates. This covers all an individual's convictions, spent and unspent; it is available only to those employers who are entitled to ask questions about spent convictions.
 - Enhanced disclosure certificates. This covers the same information as standard disclosure. It also includes additional information, where the chief officer of a relevant police force considers that the information:
 - might be relevant for the purpose for which the disclosure is sought; and
 - ought to be included.

This gives a wide discretion to include non-conviction information (including information that did not lead to a trial, or to criminal charges). Enhanced disclosure is available for those applying to carry out certain specified work with children or vulnerable adults⁷.

13. Where relevant, a CRB check will also include information as to whether an individual is on any of the statutory banning lists discussed in the following section of this paper.

⁷ See section 113B of the *Police Act 1997*, as amended by the *Serious Organised Crime and Police Act 2005*, and as further amended by the *Safeguarding Vulnerable Groups Act 2006*; and see regulation 5A of the *Police Act 1997 (Criminal Records) Regulations 2002*.

14. The most controversial aspect of the CRB system is the provision of non-conviction information (sometimes referred to as “soft intelligence”) by way of enhanced disclosure. From the employer’s point of view, considering such information and deciding how much weight to give it is a difficult task. The obvious temptation is to exclude any employee for whom an enhanced CRB check shows any negative information. The Administrative Court has criticised this approach: see *R (Pinnington) v Chief Constable of Thames Valley* [2008] EWHC 1870 (Admin), at paragraph 59.
15. From the individual’s point of view, a negative enhanced CRB check can create a very difficult situation. There is no easy way to challenge the inclusion of the information. There is no statutory right of appeal against the police decision to include the information; contrast the position, discussed below, in relation to the statutory banning lists. The CRB’s internal complaints procedure, under section 117 of the 1997 Act, has a limited remit. Where soft intelligence is disclosed, the CRB’s duty under section 117 is to consider whether the allegations in the enhanced disclosure were made, not whether they were well-founded: *R (B) v Secretary of State for the Home Department* [2006] EWHC 579 (Admin).
16. Some individuals have brought judicial review claims in order to challenge the police decision to disclose information. In general these have been unsuccessful, and the courts have treated the 1997 Act as conferring a wide discretion on the police.
 - The leading case is *X v Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 WLR 65. The subject of the disclosure was applying for a job as a social worker. He had previously been charged with indecent exposure, but was acquitted after the prosecution offered no evidence at trial. Details of the allegation were included in an enhanced CRB disclosure. The Court of Appeal dismissed a claim for judicial review of the police decision to disclose the allegation.
 - See also the unsuccessful judicial review claims in: *R (Pinnington) v Chief Constable of Thames Valley* [2008] EWHC 1870 (Admin); *R (L) v Commissioner of Police for the Metropolis*; *R (G) v Chief Constable of Staffordshire* [2006] EWHC 482 (Admin); and *R (L) v Commissioner of Police for the Metropolis* [2007] EWCA Civ 168.
17. An enhanced disclosure certificate is not confined to information about actual or potential criminal activity, or acts which show a propensity to crime. In one case, an individual applied for work as a casual midday assistant in a school; her enhanced CRB check disclosed that her own child had previously been placed on the Child Protection Register under the category of neglect. Her claim for judicial review failed: *R (L) v Commissioner of Police for the Metropolis*, above.

STATUTORY BANNING LISTS: THE CURRENT REGIME

18. Currently there are three statutory banning lists; these prohibit individuals from working in specified employment, and also prohibit employers from engaging them.
- There is a list maintained under section 142 of the Education Act 2002. This covers education in schools, and other education-related work. For historical reasons it is often known as “list 99”.
 - There is a separate list under section 1(1) of the Protection of Children Act 1999 (“the POCA list”), covering those considered unsuitable to work with children.
 - There is also a list for the protection of vulnerable adults (“the POVA list”), which sets out the names of those considered unsuitable to work with this group. It is maintained under Part 7 of the Care Standards Act 2000.
19. Individuals placed on any of these lists have a statutory right of appeal. Appeals formerly went to the Care Standards Tribunal. The work of this Tribunal has been transferred to the Health, Education and Social Care Chamber of the First-tier Tribunal, with effect from 3rd November 2008, under the *Tribunals, Courts and Enforcement Act 2007*.
20. The House of Lords has recently held that the POVA list contravenes articles 6 of the European Convention on Human Rights, because an individual can be provisionally placed on the list before there has been any opportunity for a hearing. See *R (ota Wright and others) v Secretary of State for Health and another* [2009] UKHL 3. The practical importance of this decision is, however, diminished by the reforms discussed in the next section of this paper.

EMPLOYMENT VETTING AFTER THE SOHAM MURDERS: THE INDEPENDENT SAFEGUARDING AUTHORITY

21. The employment vetting regime is undergoing radical reform, as the *Safeguarding Vulnerable Groups Act 2006* comes into force. The 2006 Act is intended to give effect to the recommendations of the Bichard enquiry, following the Soham murders. It creates a new agency, the Independent Barring Board. The Board operates as the Independent Safeguarding Authority (ISA).

22. The scheme created by the 2006 Act, in outline, is this.

- The three existing lists will be replaced by two new lists, one relating to work with children and one relating to work with vulnerable adults.
- A person included on either list will be barred from “regulated activity” relating to the relevant group. It will be an offence for an individual to seek to engage in regulated activity from which he is barred. It will also be an offence for an employer to use a barred person for regulated activity.
- The ISA will maintain the two new barring lists.
- So that the ISA can keep the lists up to date:
 - persons seeking to engage in regulated activity must register for monitoring with the ISA;
 - the ISA must consider information about such persons both when they apply for monitoring, and at intervals thereafter; and
 - there are detailed provisions requiring employers, local authorities and others to refer information to the ISA: sections 35-42 of the Act.

23. The definition of “vulnerable adult” is in section 59 of the 2006 Act. It is very different from the existing definition. Broadly, a person is a vulnerable adult if he is in certain settings or situations or receives certain services.

24. “Regulated activity” is defined in Schedule 4 to the Act: part 1 deals with children, and part 2 with vulnerable adults.

25. There are four possible bases for inclusion on the either barred list⁸:

- automatic inclusion;
- automatic inclusion, subject to consideration of representations;
- inclusion on grounds of behaviour; and

⁸ See Schedule 3 to the 2006 Act.

- inclusion on grounds of risk of harm.

26. The Act also makes provision about controlled activity. This is a distinct category of work with children or vulnerable adults, defined in sections 21 and 22 of the 2006 Act. Broadly speaking the difference is that a barred individual may not be employed in regulated activity; such an individual may be employed in controlled activity, but the employer must put appropriate safeguards in place.

27. Where an individual is included in either barring list there is a right of appeal to the Health, Education and Social Care Chamber of the First-tier Tribunal, under section 4 of the 2006 Act. An appeal can be brought on a point of law or an issue of fact; but the decision whether it is appropriate for an individual to be included in a barred list is specifically stated not to be an issue of law or fact (see section 4(4)).

28. The new scheme will operate alongside the CRB disclosure scheme, and does not replace it. Hence employers will be entitled to standard or enhanced CRB checks, as at present, and in addition will be entitled (and obliged) to check whether individuals are on a relevant ISA barring list. The scope of the scheme is very wide indeed; apparently it is anticipated that once it is fully operational some 11 million individuals will be subject to ISA monitoring.

29. The 2006 Act is being brought into force in stages⁹.

- From 20th January 2009, the ISA has taken over the task of updating the three existing statutory lists.
- As from 12th October 2009 these three lists will be replaced by the two new lists introduced by section 2 of the 2006 Act.
- From July 2010, new entrants to roles working with vulnerable groups, and those switching jobs within the sector, will be able to register with the ISA. Employers will be able to check registration status online.
- By November 2010 new entrants and those moving jobs will be obliged to register with the ISA, and employers will be obliged to check their status.
- The intention is to bring the whole of the existing workforce into the scheme by 2015.

⁹ For information about the progress of implementation, see the ISA's website: e.g. at <http://www.isa.gov.org.uk/Default.aspx?page=372> and at <http://www.isa.gov.org.uk/Default.aspx?page=385>

INFORMAL BLACKLISTS

30. Informal blacklists have been a feature of the labour market for many years. The Economic League was a private employment vetting agency founded in 1919. It disbanded in 1994, having been the subject of considerable controversy in the 1980s; allegedly it had a list of 22,000 political subversives, including Gordon Brown¹⁰. Section 3 of the *Employment Relations Act 1999* empowered the Secretary of State to make regulations to prohibit blacklists of trade union members or activists; no regulations have ever been made.
31. On 2nd March 2009 the Information Commissioner's Office (ICO) served an enforcement notice under the DPA on a business known as the Consulting Association¹¹. The Association held records on over 3,000 individuals working in the construction industry, including information about their trade union activities. There was a list of subscribers within the construction industry who had access to the information. The ICO considered that the operation of the blacklist breached the DPA: information was held about individuals without providing those individuals with the fair processing information required under the DPA, and without satisfying any of the DPA conditions for processing personal data. The practical effect of the enforcement notice was to shut down the Consulting Association.
32. Any business subscribing to a blacklist of this nature runs considerable risks. There is likely to be reputational damage if the use of the list becomes public. If it is unlawful under the DPA to maintain the list, then it is strongly arguable that use of the list by an employer will also be unlawful. Where individuals are blacklisted as troublemakers because they have brought discrimination proceedings, then use of the blacklist may involve unlawful victimisation under the discrimination legislation.

¹⁰ See Guardian, 9th September 2000: <http://www.guardian.co.uk/business/2000/sep/09/emu.theeuro>

¹¹ See http://www.ico.gov.uk/upload/documents/library/data_protection/notices/tca_enforcement_notice.pdf: enforcement notice dated 2nd March 2009.

RECRUITING THE FACEBOOK GENERATION

33. The media often discusses the (supposed) change in attitude towards personal privacy among those now in their teens and twenties. The argument is that this generation is making unprecedented amounts of personal information available online, e.g. via blogs or social networking sites. There is often speculation that individuals may regret this in later life, if their employment prospects are affected.
34. There is a steady stream of stories about individuals who have been disciplined or dismissed for posting information online. For instance:
- a magistrate recently resigned, after complaints about his use of the Twitter network to post information on cases¹²;
 - last month a prison officer was dismissed for making friends with inmates on the Facebook website¹³.
35. From an employer point of view the information that is available online is dangerous, in a different way. Recruitment panels may be tempted to conduct their own online research into candidates. But the information that they discover will be very hard to validate or assess. Some of it may be information that ought not to be taken into account, for discrimination law reasons: e.g. information about plans to start a family. In general recruitment panels should be discouraged from trawling the internet as part of the recruitment process.

¹² <http://news.bbc.co.uk/1/hi/england/shropshire/8018471.stm>

¹³ <http://news.bbc.co.uk/1/hi/england/leicestershire/7959063.stm>