

Discussion paper 6

New disclosure and barring services – what employers need to know

As part of the Government's review of the Vetting and Barring Scheme, which was introduced in October 2009, a new scaled back employment vetting scheme will be introduced along with a reform of the criminal record checking regime. This *Discussion paper* summarises the key changes and highlights the implications for employers in the NHS. We also want to engage employers in the debate about the implications for pre-employment checks in the future and would encourage you to respond to the key questions posed in this *Discussion paper*. Your responses will help us work in partnership with the Department of Health and Home Office to ensure we can develop appropriate guidance to help you implement these changes effectively.

Background

Many thought the Vetting and Barring Scheme was well intentioned but was a disproportionate response to the risk posed by a small minority of people who wished to commit harm to vulnerable people. Therefore, in June 2010, the Government announced that the planned introduction of the registration and continuous vetting elements of the scheme from July 2010 were to be halted, pending a thorough review of the scheme to scale it back to common sense levels.

The Government is clear that safeguarding should be everybody's business and that we need a society where everyone cares about vulnerable people. Employers should continue to ensure that they have stringent recruitment

processes in place and carry out thorough checks of information supplied at the application/ interview stage. In particular, checking previous employment history through following up references, and Criminal Records Bureau (CRB) checks, where the individual is eligible under legislation or where there is a mandated requirement by Department of Health policy, as outlined in the **NHS Employment Check Standards**.

In parallel to the review of the scheme, the Home Office also commissioned Sunita Mason, the Government's independent adviser for criminality information management, to review the criminal records regime in two phases. These examined whether the current system strikes the right balance between respecting civil liberties and protecting the public.

Key points

- In 2009/10 approximately 4.3 million criminal records checks were carried out by the CRB.
- Of the applications in 2009/10, more than half related to individuals who had previously applied for a check (since 2002).
- 95 per cent of reapplications show no new criminal record information.
- On average the CRB receives 1,408 applicant copies of certificates per month returned as undeliverable, mainly due to address changes.

The **first phase** of Sunita Mason's review was published on 11 February 2011. The second phase deals with broader issues relating to the handling of criminal records. The Government will be making a formal response to her recommendations on both stages of the review on 6 December 2011.

Key changes

The Protection of Freedoms Bill contains measures to change the scope of the Vetting and Barring Scheme for protecting vulnerable groups, and makes changes to the system for criminal record checking.

Recommendations include:

- introducing a system that allows for continuous updating of criminal record data improving transferability of checks between jobs
- abolishing the introduction of registration and monitoring requirements
- maintaining the current barring provisions but reducing the scope of 'regulated activity'
- abolishing 'controlled activities'
- creating the Disclosure and Barring Service (DBS). This will be a new non-departmental public body.

A series of communication bulletins are being produced by the Home Office on the vetting and barring and criminal records review aspects of the Bill. You can download copies

of the bulletins, along with the Protection of Freedoms Bill and follow the progress of the Bill through Parliament on the **UK Parliament website**.

Areas for discussion

1. Portability

Portability refers to the re-use of a CRB check obtained for a position in one organisation and later used for a position in another organisation. Calls for greater portability of criminal record checks have been a recurrent theme of feedback from employers. Currently a CRB disclosure has no term of validity and only provides information up to the point of issue. The Protection of Freedoms Bill outlines proposals to provide a new system that will include the continuous updating of criminal record data, allowing better transferability of CRB checks and

Key question for employers:

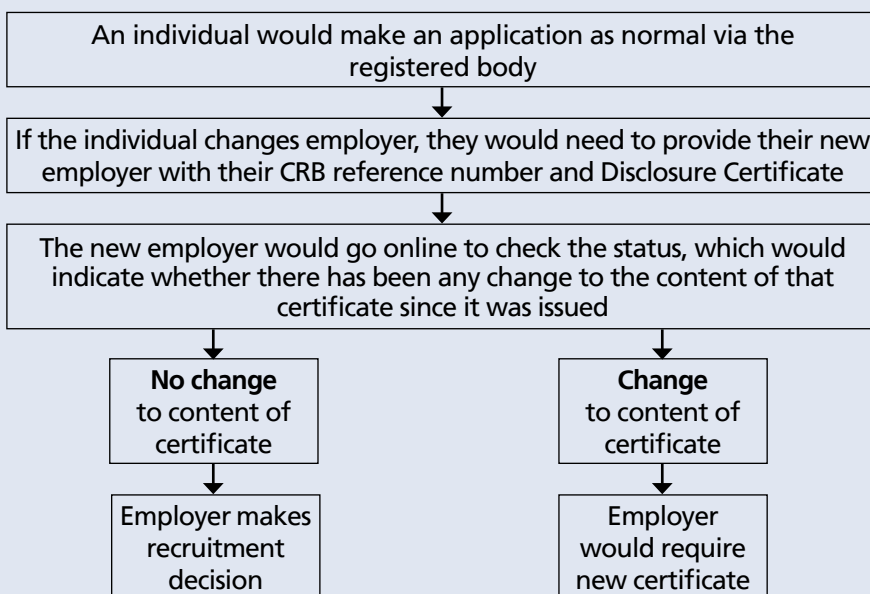
- Referring to the portability process flowchart, do you see this process helping or hindering your recruitment practices?

reducing the burden of carrying out unnecessary repeat checks. The flowchart below outlines how this process might work.

By law the applicant will remain responsible for paying the fee for the CRB check but employers may choose to cover the cost.

Please note that any amendment to existing legislation will be subject to parliamentary approval and systems will only be put in place once it has been fully developed and tested by the Criminal Records Bureau. More information will be available in due course.

Flowchart



2. Applicant only certificate

The Government intends to put the applicant in control of the information released in a CRB certificate. At present when an individual requests a CRB check, via a registered or umbrella body, a certificate is issued to both the individual and the registered or umbrella body at the same time. The Government will be introducing measures for individuals only, to be issued with the CRB certificate.

It is expected that applications for CRB checks will continue to be requested through a registered or umbrella body in the same way they are now and in compliance with the CRB's Code of Practice. Once the individual has received the result of the check, they will then have an opportunity to check the information disclosed and, if necessary, challenge the accuracy of the content before sharing this with any prospective employer. Employers will be required to follow the exact same principles as they do currently with checking and validating all other documentation required as part of their recruitment process.

Most importantly, this process will place the responsibility and ownership of the certificate on the individual in much the same way as with a passport or driving licence. It will be their responsibility to retain the certificate for the purposes of portability. The CRB cannot provide replacement certificates, so unreceived, lost or

Key questions for employers:

- Do you see any potential risks with the move to the certificate going to the applicant only?
- Would these risks be mitigated by a notification to the employing organisation when the criminal record certificate has been issued and whether it is clear of any information?

destroyed certificates will require a new disclosure application. The Government is considering whether provision should be made to notify employing organisations when a criminal record certificate is issued and whether it is clear of any information.

3. CRB eligibility

One of the key issues employers have reported under the current criminal record regime is the lack of clarity on definitions of criteria for a check. This has led to misinterpretation and inconsistency in application for checks across the country. The recommendations in Sunita Mason's review include applying stringent compliance measures on employers who routinely submit applications for ineligible checks (this does not require legislation, so it is not in the Protection of Freedoms Bill). It is crucial that definitions provide absolute clarity on the criteria, so trusts can make informed decisions against the roles and responsibilities of the job.

Definition of regulated activity

The Bill also contains proposals to redefine the requirements of 'regulated activities' to include those who provide health or personal care; assist with personal finance; or assist those who lack capacity, regardless of the frequency that they undertake this activity (see examples on next page). The frequency test, specified place and specified positions currently forming the eligibility criteria will be removed.

This definition also applies to self employed (GPs, dentists, pharmacists and so on), anyone employed directly by a trust (regardless of term of contract), agency, contractors and volunteers. The only exception is when regulated activity is provided by a family member or friend.

Key question for employers:

- The scheme will remove the frequency test, specified place and specified positions which currently form the eligibility criteria. What additional guidance is needed to make risk based decisions about eligibility?

Examples of roles where the employer is not required to request a CRB check:

- administrative or management staff who work in a separate building to patient areas or whose contact purely consists of walking through patient access areas to get to their place of work

- contractors who deliver equipment to the hospital site but who do not have actual direct contact with vulnerable groups.

Examples of volunteer roles where the employer must require an enhanced CRB check:

- organised service that helps with patient shopping
- dementia services
- delivering meals to an adult ward, providing assistance to patients who cannot feed themselves unaided.

Examples of volunteer roles where the employer is not required to request a CRB check:

- preparing meals within the hospital kitchen, no contact with patients on a ward
- working in a shop based in the hospital site where access to patients is likely to be purely incidental.

Examples of providing health care include:

- invasive medical treatment
- psychiatric care and counselling
- advising on management of health or medical condition
- transporting patients (porters, ambulance, patient transport)
- investigative, assessment and prescribing
- therapeutic, palliative, pain relief and end of life care.

Examples of providing personal care include directly providing personal care, or prompting service users to carry out, personal care tasks such as:

- dressing, undressing
- washing, bathing, shaving
- toileting
- administering medication
- managing pressure risk.

Examples of assisting with personal finance include having access to cash or the account of a person receiving health or personal care, such as:

- shopping
- paying bills
- managing accounts or making investments on their behalf.

Protection of Freedoms Bill

The Protection of Freedoms Bill, which will underpin the new disclosure and barring services in legislation, was introduced in the House of Lords on 12 October 2011. To keep up to date with the Bill's progress and to see a full version with explanatory notes, please see the [UK Parliamentary website](#), referring specifically to Part 5 (chapters 1, 2 and 3), Safeguarding Vulnerable Groups, Criminal Records and the Disclosure and Barring Service.

Examples of assisting those who lack capacity include:

- managing finances
- making decisions on health, well-being and where to live
- advocating on behalf of person who has mental health or health needs
- making decisions about the detention of a person who lacks capacity.

Key milestones

Key milestones are outlined in the table below and further information will be communicated through the Bill bulletins on the [UK Parliament website](#) and the [NHS Employers organisation's website](#) in due course

Key milestones



What this means for employers now

Employers should continue to follow the pre-employment checking requirements outlined within the **NHS Employment Check Standards**, but should begin thinking about the implications of the changes. The legal and mandated requirements outlined in the standard for obtaining criminal record checks was amended in January 2011 and remains correct. Additional guidance will be provided as more information becomes available from the Home Office and new requirements come into force.

The new body, which will be known as the Disclosure and Barring Service (DBS), will provide comprehensive disclosure and barring services. However, until all the appropriate legislation and the new arrangements are established, the current responsibilities of the Independent Safeguarding Authority (ISA) and CRB will remain.

Duty to make referrals

Under the terms of the Safeguarding Vulnerable Groups Act (2006), employers have a legal duty to make a referral to the ISA where they have dismissed or removed a member of staff or volunteer from working in regulated activity because they have harmed, or posed a risk of harm, to a child or a vulnerable adult. It is also a criminal offence for an employer to knowingly employ a barred person.

New legislation will not make any change to this duty on employers. However, the ISA has reviewed its referral guidance and form. They are also engaging with employers and sectors to help them better understand and deliver their referral duties. Further information can be found on **the ISA's website**.

Key question for employers:

- **Is the process of making a referral to the ISA and the circumstances under which a referral should be made, clear from existing guidance?**

Further information

Further information about the process for applying and checking criminal record information will be published by the CRB in due course. The NHS Employers organisation will keep employers up to date with developments through our web pages and the NHS Workforce bulletin.

Have your say

To enable us to represent employer views and to influence the development of policy and frameworks, we would like to hear from you. Please take the time to complete our **online survey** responding to the key questions posed below. By responding you are helping us to give a representative view on behalf of employers.

Key questions for employers:

1. Do you see the increased portability process as helping or hindering your recruitment practices?
2. Do you see any potential risks with the move to the certificate going to the applicant only?

If so, would these risks be mitigated by a notification to the employing organisation when the criminal record certificate has been issued and whether it is clear of any information?

3. The scheme will remove the frequency test, specified place and specified positions which currently form the eligibility criteria. What additional guidance is needed to make risk based decisions about eligibility?
4. Is the process of making a referral to the ISA and the circumstances under which a referral should be made clear from existing guidance?
5. Can you foresee any other issues for employers relating to these recommendations?

Responses are requested by 16 January 2012, any queries may be directed to employmentchecks@nhsemployers.org

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 help employers make sense of current and emerging healthcare issues to ensure that their voice is front and centre of health policy and practice. We keep them up to date with the latest workforce thinking and expert opinion, providing practical advice and information, and generating opportunities to network and share knowledge and best practice.

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.

The NHS Employers organisation 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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