

Audit Committee

23rd November 2017



Report of: **Shahzia Daya Monitoring Officer and Service Director Legal and Democratic Services**

Title: **DBS checks for Members of the Council**

Ward: **Citywide**

Officer Presenting Report **Nancy Rollason, Head of Legal Service**

Recommendation

1. To note that that Basic checks will be undertaken in respect of all Members and that Enhanced checks without Barred list checks will be undertaken in respect of Members who occupy specific roles as set out below.
2. That a policy will be drafted to give effect to recommendation 1

Summary

A report was requested by the Audit committee in respect of the level of checks that should be undertaken in respect of elected Members of the Council. It sets out the relevant legislation, DBS guidance and practice elsewhere and seeks agreement to the proposed approach to Disclosure and Barring Service.

The significant issues in the report are:

There is no policy in place for DBS checks for Councillors

The law specifies that the Council is entitled but not required to undertake checks for Councillors who discharge Education and Social Service functions.

This approach is confirmed by the DBS

There is no unified approach nationally and there are differing interpretations of Education and Social Services Functions

Consultation

1. **Internal - Director of Childrens Services, Director of Adult Services, Strategic Director Resources, Head or HR**
2. **External - DBS, LGA, Authorities set out in Appendix 1**

Context

The Disclosure and Barring Service

1. The Protection of Freedoms Act 2012 (“PFA”) introduced changes to the arrangements for carrying out criminal records checks. One of the key changes involved the merger of the Criminal Records Bureau (“CRB”) and the Independent Safeguarding Authority (“ISA”) in December 2012 to form a new body called the Disclosure and Barring Service (“DBS”).
2. The DBS is a non-departmental public body, sponsored by the Home Office. The DBS provides access to criminal records and other relevant information for organisations in England and Wales and is also responsible for investigating safeguarding concerns and maintaining the barred lists for Children and Adults and the combined list (these are statutory lists containing details of people considered unsuitable to work with children and/or adults).

Level of DBS Checks that can be applied for from the DBS

3. Basic disclosure certificate - shows any ‘unspent convictions’ someone may have in the UK. A basic disclosure shows a conviction record at a point in time, so there is no set time that it lasts for. Individuals can apply and pay for a basic Disclosure themselves. This is not the same as a DBS Standard check.
4. Standard - checks for spent and unspent convictions, cautions, reprimands and final warnings.
5. Enhanced , this includes the same as the standard check plus any additional information held by local police that is reasonably considered relevant to the role being applied for.
6. Enhanced with barred list checks, this is like the enhanced check, but includes a check of the DBS barred lists. An employer can only ask for a barred list check for specific roles. It’s a criminal offence to ask for a check for any other roles.
7. The level of DBS check that can be submitted for a Councillor depends on the role that is being carried out and is based on whether “Regulated activity” as set out by the Safeguarding Vulnerable Groups Act 2006 (detail below) is being undertaken.
8. The Police Act 1997 Regulations set out which roles are eligible for enhanced DBS checks. This includes undertaking regulated activity. The definition of regulated activity is set out below:

New definition of Regulated Activity

9. There are now two definitions of ‘regulated activity’ (originally defined in the Safeguarding Vulnerable groups Act 2006 (SVGA):

(i) the definition following the changes introduced by the Protection of Freedoms Act 2012 which restricts regulated activity as set out below:

Regulated Activity in relation to Children

- i. Unsupervised activities: teaching, training, instructing, caring for or supervising children, or providing advice/guidance on well-being, or driving a vehicle only for children;
- ii. Work for a limited range of establishments (‘specified places’), with opportunity for contact: for example, schools, children’s homes, childcare premises. Not work by supervised volunteers.

Work under (i) or (ii) is Regulated Activity only if done regularly (carried out by the same person once a week or more often or on 4 or more days in a 30-day period);

- iii. Relevant personal care, for example washing or dressing; or health care by or supervised by a professional;
- iv. Registered child-minding; and foster-carers.

Regulated activity relating to adults

- i. Providing health care;
- ii. Providing personal care (e.g. providing/training/instructing/or offering advice or guidance on physical assistance with eating or drinking, going to the toilet, washing or bathing, dressing, oral care or care of the skin, hair or nails because of an adult’s age, illness or disability; or prompting and supervising an adult to undertake such activities where necessary because of their age, illness or disability);
- iii. Providing social work;
- iv. Providing assistance with cash, bills and/or shopping;
- v. Providing assistance in the conduct of a person’s own affairs, e.g. by virtue of an enduring power of attorney;
- vi. Conveying- transporting an adult because of their age, illness or disability either to or from their place of residence and a place where they have received, or will be receiving, health care, personal care or social care; or between places where they have received or will be receiving health care, personal care or social care. This will not include family and friends or taxi drivers.

(ii) the ‘saved’ definition of Regulated Activity from the SVGA which provides that a Member or co-optee will be undertaking regulated activity if they:

10. (a) discharge, as a result of their membership, any education or social services functions of the Council;
- (b) are a Cabinet Member (the Cabinet discharges education and social services functions);
- (c) are a Member of a committee of the Cabinet (there are currently no such committees);
or
- (d) they are a Member of a committee of the Council which discharges education or social services functions.

Other points to note

11. Requiring an Enhanced check is a substantial interference with a person's right to respect for private life under Article 8 of the European Convention on Human Rights.
12. DBS checks carried out by the Council are only relevant for Councillors acting in their capacity as Councillors. If Councillors carry out roles outside of this capacity involving work with children or adults (for example, volunteering with the scout movement or in a children's centre), it is their responsibility to check with the relevant organisation regarding that organisation's own DBS checking requirements.
13. Councillors who do not carry out any of the specific educational and/or social service functions set out above but who attend community events, take surgeries or visit local residents in their own home where they have access to the general public including children do not meet the legislative criteria but a Basic Check from Disclosure Scotland could be requested.
14. In seeking to identify the appropriate options to propose to Councillors in relation to the undertaking of DBS checks for Councillors, the DBS, LGA and other local authorities have been consulted. The LGA does not have a policy on this and there are a range of practices in Councils nationwide. The DBS position (see appendix 2) supports the recommended option.
15. Most Councils consulted undertake Enhanced DBS checks for some or all of the Cabinet, and for elected Members who sit on committees or boards that have an education or social services functions. The minority of Councils require Enhanced or Standard DBS checks, or a basic disclosure, for all Councillors. (see appendix 1)

Cabinet and Committees that are eligible for Enhanced Checks

16. In relation to the Council's Cabinet and committees that discharge education or social services functions for the purposes of the saved definition of regulated activity, whether enhanced checks are needed will depends on whether functions are actually being discharged as opposed to a committee scrutinising, advising upon or otherwise having an interest or stake in education or social care functions. On that basis it is recommended that those eligible for Standard or Enhanced checks are members of Cabinet and the Corporate Parenting Panel.

Other Options Considered

3. To carry out no DBS checks.

Without any checks taking place it would not be possible to check an individual's background and determine whether an appointment to a particular role may be less suitable for them in light of a relevant disclosure. In order to protect those who are most vulnerable in society it is proposed that this option be rejected

4. To carry out basic checks for all Members and co-optees.

Certificates list unspent convictions. The Council can request basic certificates in respect of any elected Member or co-optee and this gives basic information sufficient for most Council roles but does not provide the level of detail required for some responsibilities

5. To carry out enhanced DBS checks with a check of the barred lists

The council is has a duty to seek this check for employees who are undertaking regulated activity. Members are highly unlikely to be undertaking regulated activity in that capacity.

6. To carry out Standard or Enhanced DBS checks in relation to all Members

The Council is only entitled to request that DBS checks be carried out in relation to Members who fall within the saved definition of Regulated activity . The Council is not, therefore entitled to request Standard or Enhanced checks for all members.

Legal and Resource Implications

Legal

As set out in the report

Legal advice provided by Nancy Rollason Head of Legal service

Financial

Revenue

There will be an initial cost of approx. £2500 pounds, which will occur every three years, if that is the agreed review period. In between there will be a small charge if any new members are elected. No budget has been identified for these costs

Dave Willis – Finance Business Partner

Human Resources

HR will be asked to process and monitor the DBS checks for Members and at this time it can be absorbed within the current resource

HR advice provided by Jacquie McGeachie Interim Head of HR

Appendices:

Appendix 1 – Other Authorities approach to DBS checks for Members

Appendix 2 – Guidance from the DBS on checks for Members

Background Papers: None

Appendix 1: DBS Checks for Elected Members – policies of other local authorities and the LGA

Council	Policy
The LGA	The LGA do not have a specific policy. They say that any member who would have contact with children as part of their role should be DBS checked. They are aware that some councils do require all of their elected members to undertake DBS checks, although this is an operational decision taken by individual councils and not something that the LGA specifically recommend.
Sheffield City Council	DBS checks will only be required for roles which involve children and young people: the Leader, Cabinet Members for Children and Young People, and for Health and Social Care, as well as relevant Cabinet Advisers and Shadow Cabinet Member, and members of the Licensing Committee, and Corporate Parenting – Link Members (visitors to residential facilities)
Brighton and Hove City Council	Members involved with children and adults service committees/groups are checked to an enhanced level without barred lists.
Rotherham Metropolitan Borough Council	All Councillors undergo standard DBS checks, certain Councillors (Leader, Deputy, Cabinet Member for Adult Social Care, and others) undergo enhanced check.
Cornwall Council	Cabinet Members and those on Adoption and Fostering Panels are subject to an Enhanced DBS without Barred List check. All other members and co-opted persons have a Basic Check.
Waltham Forest Council	No Councillors undertake DBS checks.
Wolverhampton City Council	All councillors undertake standard DBS checks.
East Sussex County Council	Undertake Enhanced DBS with Barred List checks on member roles that meet the definition of 'Regulated Activity'. Currently they do not class any member roles as being in Regulated Activity, so complete no checks.
Surrey County Council	Currently complete Enhanced DBS check for all members, but have recently been challenged by the DBS on this approach. They are now reviewing their stance, and are only undertaking enhanced checks for members who meet the regulated activity test Basic Checks only for all other members.
Kent County Council	Adoption and Fostering Panel members are subject to an Enhanced DBS with Barred List check. All other elected members are subject to an Enhanced DBS without Barred List check.
Nottinghamshire County Council	Undertake enhanced checks on all Councillors
Ashfield District Council	Undertake enhanced checks on all Councillors

Appendix 2: DBS position on Checks for Members as at September 2017

Dear Mr Horwitz,

Thank you for your email dated 6 September 2017 regarding your enquiry. This has been passed to me for reply.

It may be helpful if I begin by advising that the Protection of Freedoms Act 2012 significantly amended definitions of regulated activity with children and adults. This impacted on the level of DBS check that is available for Local Authority Councillors. The level of DBS check that can be submitted for a Councillor depends on the role that is being carried out and it is important to note that not all Councillors will be able to get a DBS check.

If a Councillor carries out educational and/or social service functions relating to children and/or adults who receive a health or social care service, an enhanced DBS check without a check of any barred list can be requested.

The position of Councillor is not a standalone position listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. However, carrying out a role which would have been regulated activity before the amendments made by the Protection of Freedoms Act 2012 is in the Exceptions Order and so entitlement for a councillor to be checked through the DBS at enhanced level can be found in the Police Act regulations work with children and work with adults definitions but only if they carry out specific functions.

Councillors who carry out education or social services functions relating to children

The Police Act 1997 (Criminal Records) (Amendment No.2) Regulations 2013 definition of work with children sets out which roles are eligible for enhanced DBS checks. This includes a provision at 5C(1)(A) which states:

“considering the applicant’s suitability to engage in any activity which is a regulated activity relating to children within the meaning of Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006 as it had effect immediately before the coming into force of section 64 of the Protection of Freedoms Act 2012”.

In relation to Councillors, the specific reference is set out below.

A person is a member of a relevant local government body if –

- i. he is a member of a local authority and discharges any education functions, or social services functions, of a local authority;*
- ii. he is a member of an executive of a local authority which discharges any such functions;*
- iii. he is a member of a committee of an executive of a local authority which discharges such functions*
- iv. he is a member of an area committee, or any other committee, of a local authority which discharges such functions.*

This includes a reference to any sub-committee which discharges any such functions.

What level of check can be requested?

If any of the conditions above are met then a Councillor would be eligible for an enhanced DBS check without a check of the children's barred list.

Councillors who carry out social services functions relating to adults

The Police Act 1997 (Criminal Records) (Amendment No.2) Regulations 2013 definition of work with adults sets out which roles are eligible for enhanced DBS checks. This includes a provision at 5B(1)(g) which states:

The exercise of a function of a person who is ;

- i. a member of a local authority and discharges any social services functions of a local authority which relate wholly or mainly to adults who receive a health or social care service within the meaning of paragraph (9) or a specified activity within the meaning of paragraph (10);*
- ii. a member of an executive of a local authority which discharges any such*
- iii. functions;*
- iv. a member of a committee of an executive of a local authority which*
- v. discharges any such functions; or*
- vi. a member of an area committee, or any other committee, of a local authority*
- vii. which discharges any such functions;*

In summary the services would be related to residential care, providing direct payments support services and specialist transport but please see the link below for full details of paragraph 9 and 10 in the regulations.

Other circumstances

Councillors who do not carry out any of the specific educational and/or social service functions but who attend community events, take surgeries or visit local residents in their own home where they have access to the general public including children do not meet the legislative criteria but a Basic Check from Disclosure Scotland could be requested.

Roles that are eligible for a barred list check and meet the definition of regulated activity with children and/or adults are entitled to a barred list check. The Department for Education has issued guidance on this matter for regulated activity with children, and the Department of Health has issued guidance for regulated activity with adults. Please see:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550197/Regulated_activity_in_relation_to_children.pdf

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf

In addition, there are some roles that are not classed as regulated activity but are eligible for a barred list check. Details of these roles are available within the DBS

Children and Other Workforce guidance, which is available at <https://www.gov.uk/government/publications/dbs-workforce-guidance>.

I trust you find this information helpful.

Please note your DBS Customer Services Correspondence Number is in the Subject line of this email which is the first 9 digits. Please use this reference when corresponding with the DBS via email or letter as it helps us to associate your correspondence quickly and to provide the best possible service. [This is only for correspondence and is not your Form/Ebulk/CRM/Subscription number which relate to your disclosure application.]

Yours Sincerely,

Damian Bell
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