

Disclosures and Barring Service DBS

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Division and Local Member: All

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1. Summary/link to the County Plan

- 1.1.** The Disclosure and Barring Service (DBS) helps prevent unsuitable people from working with vulnerable groups, including children. It replaces the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA).
- 1.2.** At the meeting of the County Council in July 2015 the Council accepted the recommendation of the Standards Committee that all members whose duties bring them into contact with young children or vulnerable adults should have DBS checks. This included: the relevant Cabinet members; members of the Scrutiny Committees for Children and Families and/or Adults and Health; members of the Adoption and Foster Panels; any member who partakes in a visit to a Children's home and whose Corporate Parenting responsibilities involve interaction with children; and members appointed to Panels or working groups relating to education or adult social care services.

In addition all other members were advised and invited to have DBS checks.

This policy was based on an assessment of the legislative requirements.

- 1.3.** The Constitution and Standards Committee in October 2017 requested that the Monitoring Officer present a report to Council to revisit the policy with a view to requiring all members to be DBS checked. It feels timely to revisit the policy given the continuing emphasis on safeguarding and an assessment of DBS policies of other councils in relation to members.

2. Recommendations

- 2.1. That the Committee recommends the Council that the existing policy be extended to provide from today: :**
 - (a) An extension of the current mandatory requirement to have Enhanced DBS checks without barred list checks to: all Cabinet members; Junior Cabinet Members; members of the Adult and Children & Families Scrutiny Committees; members of the Adoption and Foster Panels; members of the Corporate Parents Board; and Members appointed to Panels or working groups relating to education or adult social care services.**

- (b) That all other members and co-opted members are required to undergo a Basic DBS check.
- (c) That DBS checks required under (a) and (b) above will be carried out by the Council immediately following each Council election to ensure that such checks are renewed on a quadrennial basis.
- (d) That the Monitoring Officer maintains a register of approved applications.

2.2. Council is asked to note that if the amended policy set out in paragraph 2.1 above is agreed, then any member who refuses a DBS check under this policy will be in breach of the Members' Code of Conduct for failure to comply with Council policy and will be subject to a potential range of sanctions which can be imposed in these circumstances.

2.3. The recommendation at 2.1 is based on our interpretation of the legislative requirements, some initial advice from the DBS service, emerging approaches of other councils and an assessment of the risks associated with the options identified and explored. Further clarification has been sought from the DBS service on the legal position and in particular the interpretation that applies to the Enhanced DBS requirement. At the time of publication of this report, this advice had not been received. We are hopeful that this advice will be received before the Council meeting and we therefore reserve the right to present amended recommendations on the day depending on the advice received.

3. Background

3.1. The DBS is a non-departmental public body, sponsored by the Home Office. It was formed in 2012 by the merger of the Criminal Records Bureau ("CRB") and the Independent Safeguarding Authority ("ISA") under the Protection of Freedoms Act 2012 which made changes to the arrangements for carrying out criminal records checks. 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).

There are various level of checks that can be applied for –

1. 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
2. Standard disclosure certificate - checks for spent and unspent convictions, cautions, reprimands and final warnings.
3. Enhanced disclosure certificate, this includes the same as the standard check plus any additional information held by local police that's reasonably considered relevant to the role being applied for.

4. Enhanced disclosure certificate with barred list checks, this is like the enhanced check, but includes a check of the DBS barred lists. Under the legislation no elected member would qualify for this level of check.

3.2. Legislation in 2012 significantly amended definitions of regulated activities with children and adults which impacted on the legal position of DBS checks in relation to members. It is reasonable to say that the legislative requirements allow for a degree of interpretation and this has contributed to policy variations around the country. The position of elected members is not a standalone position listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. However the level of check that can be carried out will depend on the role that is being carried out. The Police Act 1997 (Criminal Records) Regulations 2002 (provides that provides that a member or co-optee will be undertaking regulated activity if they:

- (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) (this can be further defined as 'decision makers');
- (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. (NB In our opinion Scrutiny Committee and Corporate Parenting Board members do not obviously come within this definition as they do not discharge a (decision-making) function).

Members falling under the above definition require an Enhanced DBS check and our view in the light of current practice and advice is that only Cabinet members qualify for certain for an Enhanced check.

Members who do not carry out activities which fall within the above categories but in the normal course of their Council business 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 for a Standard or Enhanced Check. However, a Basic Check from Disclosure Scotland can be requested (Disclosure Scotland is the part of the DBS which carries out basic checks regardless of where you live).

3.3. The challenge with the legislation is the interpretation of the term 'discharge any education or social services functions'. Some authorities have interpreted this as meaning **all** members of a local authority which has corporate parent responsibilities. At the other end of the spectrum the interpretation is that this means the lead decision makers as in the cabinet. Our current policy is based on a wider interpretation which makes it a requirement that any members whose duties are likely to bring them into contact with young children or vulnerable adults in an unsupervised capacity are required by the Council to have DBS checks. Our approach has not been challenged by the DBS service.

3.4 Other points to note

- 3.4.1** DBS checks carried out by the Council are only relevant for members acting in their capacity as elected members. If members 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.
- 3.4.2** In seeking to identify the appropriate options to propose to members in relation to the undertaking of DBS checks the practice amongst other comparable councils has been explored. Interestingly, the LGA does not have a policy position on this and there are a range of practices in councils. Most councils undertake Enhanced checks for those members with what they have interpreted as qualifying roles. A minority widen the policy out to all members with requirements that are a mix of Enhanced and Basic checks.

3.5 Options considered and conclusions

- 3.5.1** Given the different interpretations of the meaning of the legislation, we believe that there are options available to the Council in how this decision is taken forward based on an assessment of risk. These are set out below starting with the option that we consider is the closest match to the legislative requirements. The assessment of these options set out below has led to the officers' recommendation detailed in paragraph 2.1.

3.5.2 Option 1- the closest match to the legal position

This would provide for Enhanced DBS checks for the Cabinet members as the key decision makers and Basic checks for all other elected and co-opted members. Advantages:

- We consider this option to be the closest to meeting the legal definition and therefore should be the least likely to be challenged by the DBS
- It provides for all members and co-opted members to be required to undertake a check with the majority being subject to a Basic DBS check

Disadvantages:

- It doesn't provide for all of the groups of members who may have unsupervised access to vulnerable children and adults because of their roles on the Council to have Enhanced DBS checks.

3.5.3 Option 2 – extension of the current policy

The Council could retain its existing policy as set out in paragraph 1.2 but extended to add to the categories of members required to have an Enhanced DBS check with the remaining members being required to have a Basic check.

Advantages:

- It replicates and then extends our existing policy in respect of Enhanced checks for those members with roles that mean they are most likely to have unsupervised contact with children and adults and includes all of the members who fall within the definition in the legislation as qualifying for Enhanced checks.
- It strengthens the requirements for other members by making checks mandatory rather than voluntary for all members.

Disadvantages:

- Our interpretation is that this option potentially over provides (in the legal sense) for checks for a range of members who are serving on bodies involved in children's and adult's services – but not in a decision making capacity. Some Councils have been challenged by the DBS service for applying for checks to which the member is not entitled. However SCC has not been challenged to date and members may consider the risk of continuing with this approach is so minimal that it is worth pursuing as the recommended option.
- Individual Enhanced DBS applications have to be countersigned within the Council by a registered person confirming the member's entitlement to apply for the Enhanced disclosure certificate. To knowingly make a false statement is potentially a criminal offence hence the increased risk with this option going beyond the legal position. Given that we have not been challenged to date the risk of challenge for this reason seems unlikely.

3.5.4 Other options explored by officers but not covered in detail in this paper include:

- leaving the existing policy unchanged - which would have the significant disadvantage of not making checks for all members mandatory
- making it mandatory for all members to have an Enhanced check. This is considered to be too far removed from the legislative requirements to be recommended as the risk of challenge would be significant.

3.5.5 Any policy change should apply to checks requested and initiated from the date of today's decision.

3.6 Conclusions:

3.6.1 Unusually the officers are not recommending the option that is assessed to be the closest match to the legislative requirement. The reasons for recommending option 2 (the enhancement of our existing policy) is because we believe that it offers a greater level of protection to vulnerable adults and children within

Somerset and therefore provides the greatest level of assurance to the public. It does this by focusing on ensuring that Enhanced check requirements are focused on all of the members most likely to have access to vulnerable adults and children as a result of roles that they have been appointed to by the Council. It also covers the critical requirement to make it mandatory for all members to have a DBS check. The recommended option carries some risk of challenge by the DBS for applying for checks to which members are not entitled to but history suggests that the risk of such challenge is minimal.

- 3.6.2** In the event that a DBS check raises concerns then the response by the Council will be proportionate. If there is a suggestion of risk to children or adults then advice will be taken from the Council's safeguarding experts. One option is then to seek an external risk assessment before deciding next steps which could include a referral to the police for investigation through to a decision being taken to restrict the members' appointments on the Council and formal advice being given to, for example, the schools within the members' electoral division and other relevant agencies.
- 3.6.3** Whichever option is chosen by the Council, it is recommended that the policy makes it clear that the checks should be undertaken on at least a quadrennial basis and immediately following each election.

4. Consultations undertaken

- 4.1.** Information about the level of checks undertaken has been obtained from a number of authorities.
- 4.2.** This report has been brought forward following consultation on the principles with the Constitution and Standards Committee and with the support of the members of that Committee.
- 4.3.** The DBS service has been asked for advice. Initial advice was given and we are currently awaiting clarification from the service on a key legal point.

5. Implications

5.1. Financial:

The cost of an Enhanced DBS is £44 and the Basic Disclosure is £25. The estimated cost of undertaking checks for all members and co-opted members is around £2000. The main part of this cost will be incurred on a quadrennial basis giving an annual cost of around £500. This cost should be capable of being met from within the Members' budget.

5.2. Legal & Risk:

In addition to the legislative requirements outlined above, it is relevant to note that 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.

Other legal points are covered throughout the report and are designed to provide the full legal context for the recommendations and decision.

The paper also describes the risks associated with the two main options put forward for decision. Either of the options set out in the paper put in place arrangements that will provide a level of assurance to Somerset residents that the Council is taking practical actions to reduce the risk of harm to vulnerable young people and adults. To have no or inadequate arrangements in place would not enable the Council to give such assurance in relation to the protection of individuals this could harm the Council's reputation. However, it is worth reflecting that even if the policy is amended in accordance with the recommendations then DBS checks only give an assurance at a point in time and in relation to previous behaviour. They provide no guarantee of future behaviour.

5.3. Equalities, sustainability and community safety implications: There are no direct equalities implications arising from any of the proposals in this report. There are also no sustainability or community safety implications.

6. Background papers

6.1. None