

This is an edited version show the question as it was asked in a first email and the final, clear, response – I have missed out the various steps in between with requests for clarification etc. This text then is just intended to show the question and answer in a simple form.

1) Clarified question

Dear Sir or Madam

This is a general enquiry and request for information. It is not pursuant to any particular case.

Can you kindly answer the following question? (The reason for asking is research into this topic for an online publication).

If an employer wanted to check the DBS Barred Lists and the Section 142 List but *not* check a candidate's Criminal Record (or enhanced information) is that possible? Legally, as far as I can see, this is an entirely valid situation.

My question is - is this possible? Would you facilitate this?

With thanks

Kind regards

Justin Wyllie

2) Final response

The DBS operates within a framework of legislation that sets out who is eligible for, and what can be disclosed as part of, criminal records checks.

An employer is entitled to request an enhanced with barred list check for anyone taking part in regulated activity. An enhanced with barred list certificate will provide the individual's barred list status alongside records of convictions and cautions, as well as any non-conviction information that a chief officer believes to be relevant. [Ed. the point here is that if the law allows that a barred lists check can be made then it follows that an enhanced criminal records check can be made. This is because the list of roles eligible for enhanced criminal records checks is a subset of those eligible for barred list checks].

Such information may be relevant to an employer's suitability decision, and as such, standalone checks of the DBS' barred lists are not currently available. In addition, a DBS check should be considered alongside other available information, such as references from previous employers, as part of an organisation's recruitment decision. [Ed. so – while the law permits it

in practice the DBS system does not provide a mechanism for an employer to check the barred lists only]

The DBS cannot inform an employer of a barring referral or the outcome of a barring case. However, if the employer contacts DBS and can demonstrate a 'legitimate interest' in knowing if a person is barred (e.g. they employ them to work with children), then this information can be shared. [Ed. However; it appears that they are keeping their options open and do consider the possibility in special cases of supplying barring list information without the criminal records check]

While the legislation relating to DBS checks refers to eligibility rather than a legal requirement to obtain checks for certain roles, there is statutory guidance from government departments (e.g. Keeping Children Safe in Education) that places a requirement on employers to request DBS checks and make appropriate suitability decisions regarding an individual's employment in regulated activity. Other sector regulators also mandate the use of DBS checks as part of their pre-employment checks, where roles are eligible. Detailed guidance on which activities with which groups of people constitute regulated activity is available in our workforce guidance as well as Department of Health and Department of Education guidance. [Ed. The Statutory Guidance referred to is issued under (Independent School Standards) Regulations 2014 and the Non-Maintained Special Schools (England) Regulations 2015. It applies to schools and colleges and mandates in effect that enhanced DBS checks with Barred List information be required for those working in schools and colleges "unless exceptional circumstances arise"].

2) Home office reply

Dear Mr Wyllie,

Thank you for your email dated 18 April in which you asked about both barred list checks and criminal records checks and the circumstances in which those were either mandatory or voluntary. Your email has been passed to me for reply.

The roles and activities which are eligible for criminal record checks are strictly limited by law. Broadly speaking, checks are only available in relation to jobs which involve special risks and sensitivities, such as working closely with children or vulnerable adults. Before an organisation considers asking a person to apply for a criminal record check through the DBS, they are legally responsible for ensuring that they are entitled to submit an application in relation to the job role. If someone has submitted an application form for a check following a request from a current or prospective employer but are unsure that the position they have applied for is eligible, they can contact the DBS to investigate. Further details are available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519060/Guide_to_eligibility_v8.1.pdf.

There are different levels of criminal record checks available

- Standard - the position must be included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.
- Enhanced - the position must be included in both the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and in the Police Act 1997 (Criminal Records) regulations.
- Enhanced checks with children's and/or adults' barred list check(s) - the position must be eligible for an enhanced level DBS certificate as above and be specifically included in the Police Act 1997 (Criminal Records) regulations as able to check the appropriate barred list(s).

Barred list checks are undertaken for those who work in what is described as "regulated activity". The full legal definition of regulated activity is set out in Schedule 4 of the Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012. Details of what constitutes regulated activity in relation to children can be found in the following Department for Education guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/550511/Keeping_children_safe_in_education.pdf

I hope the information set out above is of assistance to you.

Yours sincerely

3) My follow-up question

Dear Ms ****

Thank-you very much for your reply dated 12/5/2017 to my request for information concerning DBS checks.

Thank you very much for your detailed and helpful answer.

However. Unfortunately I still need clarification on the essential point of my original question. Further; some of your answers have raised further questions. I am asking these details below and look forward to your early answer.

The purpose of my original question is chiefly to establish when a DBS check is mandatory on the employer and when it is something which they are permitted to ask for but for which it is not a legal requirement that they must. As concerns information pertaining to criminal records and to additional police intelligence you have referred me to a) the Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975 and b) the Police Act 1997 (Criminal Records) regulations. I have perused the relevant legislation which is available online. As far as I can see in the case of criminal records information the law is concerned to describe roles which are *eligible* for a check. But the law does not state that a check *must* be made in these cases. As far as I can see the same applies to the additional 'enhanced' information which the police may provide. Establishing whether these checks are about eligibility or are mandatory was clearly the purport of my question. I would be very grateful if you could answer the question: for the roles described in Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975 (which you kindly sent me a summary of) is it the case that an employer *must in law* seek a criminal records check or not? And the same question for the enhanced information. Are there any roles at all when it is a legal requirement that an employer *must* require a DBS check for criminal records and/or enhanced information? If so; what are these roles are what is the legislation which provides for this?

With the Barred lists I essentially have the same question. Again I must thank you for the helpful information you have provided. But again I must point out that the main thrust of my question has not been addressed. The situation here appears to be somewhat different. I note that the Safeguarding Vulnerable Groups Act 2006 makes it an offence for a barred person to seek work for which they are barred and also for an employer to employ a barred person. However; the question still remains. Is it a legal requirement that an employer *must* carry out a check of the barred lists when employing someone in a regulated activity (or other applicable role)? This is not the same question as it being an offence to employ someone who is barred.

It may help if I clarify the background to this question; that is why I am asking it. The reason is I am struck by how often DBS checks are presented as if they are a mandatory requirement. I think that sometimes at least, if not always, this is not actually the case. It is the case, rather, that the law *permits* the employer to require one. (Because the work is covered by the relevant legislation). But this is not the same as being a mandatory requirement on the employer to carry out the check. This is a substantial difference. In a free society this distinction matters. Can the Home Office clarify this question? Are criminal records checks and enhanced checks ever an absolute mandatory requirement on employers or not? If so in what circumstances and under what legislation?

The above is essentially a restatement of my original question. It strikes me as being very clear what I am asking. In essence: eligible or mandatory?

Based on the information which you have kindly provided I also have 4 further questions:

- i. A person who is being considered for inclusion on the barred lists can make 'representations'. Is legal aid available for such representations?
- ii. If a person has been included on one of the DBS barred lists can they appeal? If so - who adjudicates the appeal?
- iii. Who makes the initial barring decision? Are they civil servants or employees of a private firm?
- iv. Many government documents refer to the "barring lists". Can I assume that the Section 142 list is also intended here? For example: this page (<https://www.gov.uk/disclosure-barring-service-check>) refers to how only certain roles are eligible for Barring List checks and further links to a page about the barred lists (<https://www.gov.uk/disclosure-barring-service-check/dbs-barred-lists>) but it is not clear if the same legislation (set of eligible roles) applies to checking the Barred lists as to checking the list maintained under Section 142 of the Education Act 2002. Does it?

With many thanks for your answers

Kind regards

Justin Wyllie

4) A new/separate question asked

Dear Sir or Madam

I have an outstanding request for information open with you, reference T3883/17. Please either treat this as part of the same request or as a new one, whichever is more convenient.

The new question is:

This government web page (<https://www.gov.uk/disclosure-barring-service-check/dbs-barred-lists>) states that:

Employers must refer someone to DBS if they:

sacked them because they harmed someone
sacked them or removed them from working in regulated activity
because they might have harmed someone
were planning to sack them for either of these reasons, but they
resigned first

The page links to this

page: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501318/DBS_referral_guidance_completing_the_form_v1_1_Feb_16.pdf which in turn states that this requirement is set out in the Safeguarding Vulnerable Groups Act 2006. Is this actually the case? Is there a mandatory reporting scheme in place and is this legislated for in the Safeguarding Vulnerable Groups Act 2006. Could you kindly tell me which Section in the Safeguarding Vulnerable Groups Act 2006 legislation for this (perhaps providing me with a web link?).

With many thanks

Kind regards