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Policy and Partnerships
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By email: vettinglegislation@police.govt.nz

Re: Legislation for the New Zealand Police Vetting Service – consultation

The New Zealand Law Society welcomes the opportunity to comment on the *Legislation for the New Zealand Police Vetting Service* consultation paper (paper).

Overview

The government is considering introducing an amendment to the Policing Act 2008 that would establish a legislative framework for the Police Vetting Service (PVS), following a Police-initiated joint review of the PVS by the Independent Police Conduct Authority (IPCA) and Office of the Privacy Commissioner (OPC) in 2015-2016 (Review).¹ The Review concluded that the absence of a clear framework gives rise to uncertainty about what information is relevant and appropriate for disclosure in Police vets, and legal risk for Police, agencies and individuals.²

As noted in the Review, the PVS fulfils an important purpose. It contributes to public safety and national security, by reviewing all information held by Police about an individual, to inform a potential employer or licensing agency about the individual's suitability for particular roles (including working with children, young people or other vulnerable members of society).³ A balance is needed between protecting the vulnerable and protecting the privacy interests of individuals who are the subject of vetting applications.⁴

Police vetting is clearly of significant interest and importance to New Zealanders, given the volume of vetting requests received – the Review notes that following the passage of the Vulnerable Children Act 2014 and associated regulations, Police are being asked to carry out over 500,000 vets per annum.⁵ The current consultation about the proposed introduction of a legislative framework for Police vetting is therefore welcomed.

Consultation questions

The Law Society's submission responds to the consultation questions (1, 5 – 7, 15 – 17, 22 – 25, 28 – 45, and 52 – 54) that address issues relating to privacy rights and natural justice.

¹ *Joint Review of the Police Vetting Service by the IPCA and OPC*, report October 2016.

² *Legislation for the New Zealand Police Vetting Service*, consultation paper, pp 5-6. See also the *Review* at [23]-[27].

³ *Review* at [11].

⁴ *Ibid*, at [10].

⁵ *Ibid*, at [1].

Q1 Should there be a statutory framework for the Police Vetting Service?

Yes. The Law Society agrees that a clear statutory framework for Police vetting is needed, to provide greater clarity and certainty about what information may be disclosed, and more consistency in how vetting requests are processed. Legislative guidance would assist Police in decision-making, reducing the risk of privacy infringements. It would also help agencies and individuals to understand the type of information provided in vets and the extent to which it can be relied upon.

Who can use the Police Vetting Service

Q5 Should individuals have direct access to the Police Vetting Service?

Q6 In what circumstances, if any, should individuals be able to request a Police vet on others?

Q7 In what circumstances, if any, should individuals be able to request a Police vet on themselves?

The paper considers whether there should be broader access to the PVS, including direct access for individuals seeking vets on others (e.g. in-home nannies) or on themselves (e.g. a building contractor wanting to work at multiple schools).

From a privacy perspective, there is no reason to prevent individuals having direct access to the PVS. The Law Society agrees that there would need to be clear rules about the circumstances in which an individual could access the PVS and request Police vets.⁶

The Law Society agrees there would be advantages in allowing an individual to request a Police vet on themselves (including reducing duplication of vets on the individual). Police vets are carried out in accordance with the Privacy Act 1993: under Information Privacy Principle (IPP) 6 of the Privacy Act, individuals are entitled to the information that would be released in a Police vet. Any sharing of Police vets with multiple parties should be subject to clear consent from the individual.

However, in the case of an individual requesting a Police vet on others, Police must be satisfied that the vetting subject has provided consent. To ensure privacy rights are safeguarded, Police should obtain consent directly from the subject of the information, not via the requester.

Consent, and advance notice of disclosure

Q15 Should there be a general requirement for the consent of the vetting subject to be obtained before a Police vet can be undertaken?

Yes. Consistent with IPP 11 of the Privacy Act,⁷ personal information should not be released to a third party unless specific exceptions apply.⁸ Given that Police vetting information is provided in circumstances where an individual has applied for a specific role, there is no reason why consent should not be a requirement. The consent should be obtained directly from the subject, and an approved agency should confirm in the vetting request that they have obtained the consent (as recommended by the Review).⁹ This ensures that information is not disclosed without the subject's consent.

⁶ Note 2, at p11.

⁷ Privacy Act 1993, section 6.

⁸ As discussed at p18 of the paper.

⁹ *Review*: see appendix A, recommendation 8 "the application form should be modified so the applicant agency is specifically asked for confirmation that they have obtained the vetting subject's

The Law Society agrees with the Review that Police should provide advance notice of the proposed release of information and give the vetting subject a reasonable opportunity to comment, “in every case where the Police know or have good reason to believe that the person concerned does not know that the material exists or, given the nature of their interactions with the Police, will not be expecting the release of that information in the context of a vetting application”.¹⁰ (This is also discussed in relation to the right of review: see Q52 below.)

Q16 How should the Police Vetting Service treat non-consented requests for information made under statutory authority?

The Law Society agrees that further clarification is needed about whether a non-consented request should be categorised as a vetting request or merely a request for information.¹¹ It would be appropriate for any legislative framework for the PVS to set out the process for non-consented requests.

Q17 Should there be a clear distinction between consent to process the vetting request, and consent to release the Police vet?

Yes. As the paper notes, the current practice – the vetting subject consenting to release of the information at the point of signing the request form – can create difficulties where the Police vet is ‘released with results’ (Police-held information is being disclosed).¹² It is important that the vetting subject fully understands what information they are consenting to being released in the Police vet. Maintaining a clear distinction between a vetting subject’s *consent to process the vetting request* and *consent to release the Police vet* would address this. Consistent with privacy principles, the vetting subject should have the option to authorise disclosure of the Police vet direct to the third party without viewing the material, or to withhold authorisation until after they have seen the information.

If there was a clear distinction between *consent to process the vetting the request* and *consent to release the Police vet*, vetting subjects would have an opportunity to know what information was to be released in the vet. However, the resource and process implications of this two-step process are acknowledged.¹³

authorization, as well as for the date on which this was provided.” Note that the review at p12 states “Police do not routinely see signed consent forms, but rely on the applicant agency to ensure that authorisation has been given.”

¹⁰ Paper at p19; see Review, appendix A, recommendation 11.

¹¹ Paper, at p18.

¹² However, Police do have a discretion to disclose the vet to the subject where it contains information the individual may not be expecting (for example where he/she has previously received a clean vet), even if the subject has authorised release.

¹³ As outlined in the paper at p20, the vetting subject would be able to refuse consent to release and would be able to challenge the vet, and the proposal would require significant system changes. The review also notes that it would not always be practicable for Police to give advance notice of the intended release of adverse comment (review, at p16).

Vetting of family members of vetting subject

Q22 How should the issue of family members be addressed when it is intended that they be vetted?

To ensure privacy rights are protected, consent should be obtained from a family member of the main vetting subject, if they are to be included in the vet. Any legislative framework should include the same consent process (express written consent) for family members in these circumstances.

Sharing of Police vets

Q23 With a vetting subject's authorisation, should a vetting requester be able to legitimately share a Police vet with other would-be vetting requesters?

Q24 If so, in what circumstances should the sharing of Police vets be allowed?

Q25 Should the sharing of Police vets by the original vetting requester be subject to an appropriate agreement with other would-be vetting requesters?

Yes, a vetting requester should be able to share a Police vet, provided this is with clear authorisation from the vetting subject. The Law Society agrees that there would need to be clear rules and guidelines to govern how Police vets are shared amongst organisations (including that the nature of the role the vetting subject has applied for would need to be similar).¹⁴ See also comments above in relation to questions 5 – 7.

Ongoing Monitoring

Q28 Should legislation provide authority for the Police Vetting Service to:

- *maintain the validity of Police vets through ongoing monitoring*
- *disclose new relevant Police vets to vetting requesters, as appropriate?*

Q29 Should vetting subjects be allowed to give their authority to the Police Vetting Service to release new Police vets to vetting requesters they nominate?

Q30 With regard to the release of new Police vets, how should the issue of advance disclosure to the vetting subject be addressed?

Q31 How long should monitoring continue if authorisation is not withdrawn?

The Law Society considers that legislation should enable the PVS to maintain the validity of Police vets through ongoing monitoring, provided authorisation from the vetting subject is kept updated for the release of any new information. The PVS should notify the vetting subject prior to the release of any new information (as discussed in the paper at p30).

What information can be released in a Police vet

Q32 Should only Police-held information be considered and released in a Police vet?

Yes. The Law Society agrees there is a need for greater clarity around what information can be considered and released in a Police vet. A clear legislative framework would assist.

¹⁴ At pp25-26.

Q33 Should there be a general test that information released in a Police vet must be relevant and substantiated?

Yes. A general test that information released in a Police vet must be relevant and substantiated¹⁵ should be clearly articulated in any legislative framework for the PVS.¹⁶

As the paper notes, the information held on Police files may have resulted from “any interaction with NZ Police in any context ... and any information received or obtained by NZ Police for any purpose” and some of that information will be subjective and not tested through the court process.¹⁷ Police have an obligation under Privacy Act IPP 8 to ensure that information is accurate and not misleading before disclosing it.

The Law Society endorses the comments in the Review report that:¹⁸

“The Police must take reasonable steps to determine that information is relevant and substantiated before releasing it as part of a vet. These steps should always be documented and records should be in a common format for consistency.”

Information found to be relevant and substantiated (applying the general test) would be able to be released in a Police vet. The vet should record the evidence substantiating the information (for instance, that a conviction has been entered on the basis of the information or that the vetting subject has accepted the information is correct). This would minimise the risk of inaccurate, incomplete, misleading or untested information being released.

The Law Society agrees with the Review that the standard of proof required to substantiate the information should be clearly spelt out, and should:¹⁹

“... vary according to both the nature of the information and the nature of the role that the person holds or is being considered for. Just as the relevance threshold may vary according to the nature of the anticipated behaviour, so too should the substantiation threshold.

In some cases, a balance of probabilities standard is appropriate; in other cases (such as where the anticipated behaviour is child sexual abuse), it should be lower. If the nature of the role is particularly sensitive and the issues of potential concern arising in an individual’s past are particularly serious, a lower threshold for release of unverified ‘intelligence’ information may also be appropriate.”

The Law Society also agrees with the Review recommendation that the PVS should not disclose to an agency that prejudicial information about the vetting subject exists that they cannot release.²⁰ The Review acknowledged that this puts Police in a difficult position if they possess information suggesting the vetting subject may pose a risk for the position applied for, and that this can only be

¹⁵ At p 32.

¹⁶ See *Review*, appendix A, recommendation 17: “whatever substantiation thresholds are used by Police in determining information for release, they should be clearly articulated in the written and published policies governing vetting, and the basis for any particular decision should always be documented clearly.”

¹⁷ At p31.

¹⁸ *Review* at [94].

¹⁹ *Ibid*, at [104] – [105].

²⁰ *Ibid*, at [85] – [86], and appendix A, recommendation 14.

satisfactorily resolved by the development of a comprehensive statutory framework for the vetting function.

In the interim, the Law Society agrees that general advice to approved agencies would be appropriate, making them aware that Police *may* hold relevant (conviction/non-conviction) information about vetting subjects that they are unwilling or unable to release.²¹

Limitations on information released in a Police vet

Q34 Should the legislation allow for potential limitations on the information that can be released in a Police vet (which may create safety risks for vulnerable people)?

Yes. There is certain information that is not appropriate for release, as discussed in the paper (at p34), including where disclosure would be likely to prejudice safety or the maintenance of the law.

Q35 Should the legislation provide for Police to release relevant information that is required to be kept confidential and unavailable to the vetting subject (which may be prejudicial and breach natural justice for the vetting subject)?

No. The Law Society agrees with the Review that releasing potentially sensitive and/or confidential information to a requesting agency in circumstances where the information is withheld from the vetting subject would be both highly prejudicial and a fundamental breach of natural justice.²² The presumption of innocence and the right to natural justice (enshrined in the New Zealand Bill of Rights Act)²³ justify not disclosing the information.

Q36 In either case, what could be potential considerations in terms of allocating weight to the competing risks and interests?

See the response to question 35.

Disclosure of suppressed information

Q37 In some cases should the Police Vetting Service be able to disclose suppressed information in a Police vet?

Q38 If so, what could be the main features of a test for the disclosure of suppressed information in a Police vet?

The Law Society agrees with the Review that legal clarity is needed about the circumstances in which the PVS can release information subject to a suppression order, to an applicant agency that has a genuine interest in receiving the information.²⁴

If a legislative framework for the PVS is introduced, it will need to specify the test for releasing suppressed information. As noted in the Review, a higher threshold ought to apply to the release of suppressed information, than simply that the information is relevant and substantiated.

²¹ Ibid, at [85] – [87].

²² Review, at [78]-[87].

²³ New Zealand Bill of Rights Act 1990, s27(1): “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law”.

²⁴ Review, at [74].

The current test used by Police is that suppressed information will be released (subject to a warning against publication).²⁵

- only if the vetting requester has a **genuine interest** in that information in relation to the role the vetting subject will have, and
- the vetting requester should be regarded as having a genuine interest only if the suppressed information is **unequivocally and substantially relevant** to the risk that the vetting subject may pose in the position for which they are being considered.

The Law Society agrees with the Review that it is appropriate to have a higher threshold for disclosure of suppressed information than for other, general information (where the test is merely that the information is “relevant and substantiated”).²⁶ However, the words “unequivocally” and “substantially relevant” involve different standards of certainty (the former would require close to 100% relevance, whereas the latter might be more in the range of 60 – 80%). It would be clearer and less confusing to use a single standard, such as “substantially relevant” or “highly relevant”.

The Law Society endorses the Review’s conclusion that there should be a strong presumption against release, where the PVS is aware that a court has made a final suppression order following an acquittal.²⁷ The Law Society does not agree with the paper that this presumption could be “displaced by *indications*, which would need to be fairly clear, that the suppression order is intended to protect people other than the vetting subject”.²⁸ If the presumption against release of information subject to a final suppression order is to be displaced, the justification for that would need to be clearly articulated in the policy analysis supporting the bill.

Q39 Should a test for the disclosure of suppressed information be included in the legislation?

Yes. It is important to provide a clear statutory framework for decision-making in these circumstances.

Disclosure of Youth Justice proceedings and outcomes

Q40 In some cases should the Police Vetting Service be able to disclose suppressed information concerning youth justice proceedings and outcomes in a Police vet?

Q41 If so, what could be the main features of a test for the disclosure of suppressed information concerning youth justice proceedings and outcomes in a Police vet?

Q42 Should a test for the disclosure of suppressed information concerning youth justice proceedings and outcomes be included in the legislation?

The paper properly recognises the justified limits on disclosure of information relating to youth justice proceedings.²⁹ A significant body of case law exists recognising neurodevelopmental differences between youths and adults which impact on their behaviour. The Oranga Tamariki Act 1989 is predicated on a goal (inter alia) of allowing youth to resolve adolescent offending in a way

²⁵ Paper, at p36.

²⁶ Review at [77].

²⁷ Review at [76].

²⁸ Paper, at p36 (emphasis added).

²⁹ Ibid, at p38.

that does not follow them into adulthood. A presumption against disclosure is therefore appropriate.

Legislation will need to address the test for the release of suppressed information in youth justice proceedings and outcomes. Although the paper does not specify what test would apply, the Law Society agrees a higher threshold should apply for disclosure of suppressed information in youth justice proceedings, than for cases involving adults.

However, serious sexual offending is a category that may warrant a different approach, for several reasons. Serious sexual offending may be the result of more deep-seated issues, requiring long term therapeutic input. As that kind of offending would generally occur in the age range closer to exit from the Youth Court jurisdiction, there may be less time to implement long-term therapeutic options.

Disclosure of this kind of information will inevitably have significant consequences for the young person. It would be appropriate for any vet that may involve disclosure of sexual offending to be referred (as now) to the Vetting Review Panel. This would allow clear and considered assessment of the risk factors associated with the offending (i.e. there would likely be a difference in assessment of minor offending which indicates pre-cursor behaviour, and minor offending which does not indicate ongoing concern about risk).

Disclosure of mental health information

Q43 In some cases should the Police Vetting Service be able to disclose mental health information in a Police vet?

Q44 If so, what could be the main features of a test for the disclosure of mental health information in a Police vet?

Q45 Should a test for the disclosure of mental health information be included in the legislation?

The current approach of the PVS is to release mental health information in a Police vet only where there is evidence of a link to offending behaviour or likelihood of risk to others.³⁰ This is appropriate, and consistent with the Review recommendation that “Police should not release any information about the mental health of an individual, whether of an objective or subjective nature, where there is no evidence of any link to offending behaviour or likelihood of risk to others.”³¹

Mental health is a prohibited ground of discrimination in employment under the Human Rights Act 1993, and can only be relevant where there is a risk of harm to others (see section 29). Where the information is linked to offending behaviour or there is a likelihood of risk to others, the current test of ensuring the information is relevant and substantiated³² is appropriate.

As with suppressed information, the legislation will need to clearly articulate the circumstances in which mental health information can be released.

³⁰ Paper, at p39.

³¹ At [93].

³² As discussed at page 39 of the paper, the information needs to be accurate and reliable.

Review process

Q52 On what grounds should a vetting subject be able to challenge a Police vet (for example, the Police vet is factually incorrect)?

A vetting subject should be able to challenge a Police vet, including before the information is released,³³ on the basis that the information contained in the vet is factually incorrect (including incomplete or out of date information), does not relate to the vetting subject, or should not have been disclosed (because it did not meet the required test of being relevant and substantiated).

The Law Society endorses the proposed procedure for reviewing non-conviction information, namely for it to be considered by the Vetting Review Panel, who would decide whether the non-conviction information should be disclosed.³⁴

Q53 Following a review by the Vetting Review Panel in Police, should a vetting subject be able to appeal the decision (regarding what information is released in a Police vet) to a tribunal or court?

It is important that a vetting subject has a right of appeal. The Law Society considers the proposal to allow a general right of appeal to a tribunal, with any subsequent appeal to the District Court restricted to appeals on a point of law only, is appropriate.³⁵

Establishment of an independent vetting body

Q54 Would the establishment of an independent body to manage all Police vetting be desirable?

The establishment of an independent body to manage all Police vetting does not appear to be needed, and would require significant resources which would outweigh any benefit.

Conclusion

We hope these comments are helpful, and if further discussion would assist please do not hesitate to contact the Law Society, through the Law Society's Law Reform Manager Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully



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Vice President

³³ As discussed at Qs 15 – 17 above, it is important the subject has the opportunity to challenge the validity of the information before it is released. (A review or appeal *after* the information release will often be unable to provide an effective remedy for unfairly prejudicial information.)

³⁴ At p 46.

³⁵ Paper, at p46.