The Police Vetting Service

A joint review by the Independent Police Conduct Authority and the Office of the Privacy Commissioner

October 2016

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Foreword from the Privacy Commissioner and the Chair of the Independent Police Conduct Authority

1. The Police Vetting Service has evolved to fill a need that has grown dramatically since its inception. With the passage of the Vulnerable Children Act 2014, and associated regulations, Police are being asked to vet over 500,000 New Zealanders every year.

2. The Vetting Service is to be congratulated for seeking this review. Vetting services are not like other policing services. It is perhaps not widely understood that the vetting process involves more than simply notifying of the presence or absence of a criminal conviction, or a conviction of a certain class.

3. As we explain in the report, when undertaking a vet of an applicant, the Vetting Service examines all information at its disposal. This includes criminal conviction histories, but can include a wide range of other information which Police have obtained in the course of carrying out their functions.

4. The vast majority of vetting applications proceed smoothly. Either Police have no information to indicate a concern about a candidate, or there is clear information to call into question the suitability of a candidate for working with vulnerable people.

5. However, the Police will sometimes have information that does not relate to criminal offending, or that has not been tested by a court or otherwise independently verified. Reliance on this material can be very prejudicial to the individual concerned, and leave them with very little ability to counter the prejudicial effect of a negative vet. In other cases, Police may have information about the person as a victim, witness, or in some other capacity, such as when Police attend suicide attempts or provide assistance to clinicians acting under the Mental Health Act.

6. Assessing the relevance of such information calls for a more nuanced, non-binary approach. It may call for further independent investigation or the exclusion of some categories of personal information from consideration. It should be noted that a Police vet does not absolve a prospective employer from undertaking due diligence such as reference checking, and requiring medical clearances in appropriate circumstances.

7. A more nuanced approach can be resource intensive, and therefore costly. However there will be times when the extra application of resources is necessary to achieve a fair outcome.

8. We have identified areas where the law is unsatisfactory, and as a result the Vetting Service is put in a very difficult and legally risky position. Where prejudicial information is subject to a suppression order, for example, how is the Vetting Service supposed to know whether the order is for the benefit of an accused, or offender, for the very purpose of avoiding consequences such as a negative vet, or for the benefit of a victim of a crime to protect their identity?

9. While we have been able to identify some of these difficult questions, it is beyond our scope to provide solutions. The resourcing of the Vetting Service necessary to ensure it can operate effectively in accordance with principles of natural justice, and the creation of an appropriate legal framework and legal environment under which it operates, require urgent Government attention. We hope that our review might provide the impetus for that work to be undertaken.

Sir David Carruthers

Chair

Independent Police Conduct Authority

John Edwards

Privacy Commissioner

Introduction

10. This report presents the findings of a joint review of the New Zealand Police Vetting Service carried out by the Independent Police Conduct Authority (the IPCA) and the Office of the Privacy Commissioner (the OPC). The review was initiated at the Police's request. The review's overall objective was to review the Police's vetting policies and procedures to ensure they are robust and legally compliant, and to identify opportunities for improvement (if any) to policy and practice to achieve the proper balance between protecting the vulnerable in our communities and protecting the privacy interests of individuals who are the subject of vetting applications.

Summary of the Police Vetting process

11. The purpose of the Vetting Service is to contribute to public safety and national security. A 'Police vet' is a review of all information held by the Police about an applicant to inform their potential employer's or licensing body's decision as to their suitability for the role. Police vets are generally required or obtained for roles that involve working with children, young persons or other vulnerable members of society (for example, as part of safety checks as set out in the Vulnerable Children Act 2014). In addition, about a dozen statutes require a Police vet as part of good character assessments for registration for professions where a 'fit and proper person' test applies (such as requirements under the Land Transport Act 1998 for taxi drivers or under the Education Act 1989 before a practising certificate or Limited Authority to Teach will be issued).

12. Police vets are requested by employers as part of the recruitment process; individuals cannot apply directly for a Police vet. Vetting is carried out only with the consent of the subject[1], obtained as part of their job or professional registration application.

13. To access the vetting service provided by the Police, requesting agencies must first meet certain criteria to be an 'approved agency'. Approved agencies are generally organisations that provide care for children and other vulnerable members of society, government regulatory agencies or those with legislative or other obligations to carry out screening or probity checks on individuals.

[1] In rare circumstances where consent is not confirmed by the requesting agency, the Police Vetting Service may consider the vetting request under the Official Information Act 1982 and release information where doing so meets the public interest test in section 9(1) of that Act.

14. There are over 7,500 approved agencies, including educational facilities (for example, schools and early childhood centres), sports clubs, churches, home-based carers and non-government social services organisations. The most frequent users of the Police Vetting Service are large government agencies, such as Immigration New Zealand, who submit up to 50,000 applications a year. Mid-size agencies, such as regional Child, Youth and Family offices, lodge 5,000-10,000 applications a year, while approximately 91% of agencies make 100 or fewer vetting requests per year, with many smaller agencies such as home-based child care businesses lodging only 1 or 2 applications.

15. The 'result' of a Police vet is a report by the Police to the agency which includes information about the applicant that the Police consider relevant to their suitability for the role (for example, relevant to an assessment of whether they pose a risk to vulnerable people). The Police do not provide a recommendation about whether or not the person should be appointed or licensed/registered. This judgement remains the responsibility of the agency, and the Police 'vetting result' is just one source of information that they should consider.

16. The Police receive more than 500,000 vetting applications each year, and most are processed within the 20 working day service level agreement. Vets are processed by a dedicated team. The Police database, the National Intelligence Application (NIA), which also accesses the Ministry of Justice's criminal history records, is the primary source of information used to inform vetting. The vetting team also sources information from Police districts, such as hard copy investigation files.

17. The vast majority of applications are uncontentious (for example, where the Police holds no relevant information about the individual, or where the individual has convictions which automatically disqualify them) and are processed quickly by vetting staff, who work through on average 35 to 45 applications each per hour. A proportion of applications are checked for routine quality assurance before release.

18. Over 10,000 applications each year (2%) involve information of a nature that requires the Police to consider whether or not they should disclose non-conviction details to the agency. Most of these are dealt with by Team Leaders, with some resulting in release of a written note.

19. Complex applications (around 1000 per year, fewer than 0.2%) are escalated to a File Review Officer, and of these, around 200 (or 0.05%) are referred for review to the Vetting Review Panel of senior staff. The Panel meets regularly, sometimes several times a week if there is a backlog in processing applications. Most of the complaints received by the IPCA and the Privacy Commissioner about Police vetting have involved the difficult and complex applications that are considered by the Panel.

Terms of reference and the investigative process

20. The review's Terms of Reference were agreed between the IPCA, the OPC and the Police in March 2015. The review process included:

    - on site visits to Police National Headquarters in Wellington to observe the complete vetting process. We sat alongside vetting staff and attended a number of sessions of the Review Panel that assesses more complex applications;
    - a review of the Police's written policies and operational procedure guidance; analysis of data on applications received between 2013 and 2015, including the applying agency, whether or not the protections under the Criminal Records (Clean Slate) Act 2004 applied, and the type of response ultimately provided;
    - analysis of data on the number of applications where processing had been delayed for further consideration over the past decade (2004-2014) for the dozen or so agencies most commonly experiencing delays (more than ten delayed applications in any one year);
    - interviews with a representative sample of ten applicant agencies; and
    - a comparison with vetting systems in other comparable jurisdictions (further detail is provided in Appendix B).

21. The review process also took into account a number of complaints about Police vetting that have been made to the IPCA and the Privacy Commissioner over the past decade. In total, the issues and findings in 25 cases were considered.

22. A summary of recommendations is included in Appendix A.

The statutory framework for Police Vetting

23. There is no clear statutory framework for the Police Vetting Service. The Police carry out vetting as an administrative function under section 9 (general functions) of the Policing Act 2008.

24. Since the Police Vetting Service was established in 2000, Police Vetting has developed in an ad hoc way in response to changing statutory requirements for pre-employment or pre-registration checks. Demand has increased significantly over the last 10 years, from about 200,000 applications per year to over 500,000.

25. The lack of a clear statutory framework for vetting creates uncertainty about what information can be considered as part of the vetting process. The Police consider any information they hold to be within scope of the Police Vetting Service's assessment. However, with the growth of the NIA database since its establishment in 2003, and increasing information sharing between government departments, the amount of "Police information" is growing significantly, and inevitably includes information that is subjective and has not been tested, for example, through the court process.

26. There is also uncertainty about how the Police determine what information is "relevant" for a particular vetting application. Some agencies have a very wide scope of information that may be relevant to their assessments. For example, the Land Transport Act 1998 provides that, for the purpose of a fit and proper person test, the NZTA "may seek and receive any information that the Agency thinks fit." Other agencies are governed by legislation that explicitly defines the nature of potential past behaviour that will be relevant to appointment decisions. For example, the Immigration Advisers Licensing Act 2007 prevents the Registrar from granting a licence to any person "who has been convicted, whether in New Zealand or in another country, of a crime involving dishonesty". The Immigration Act 2009 strictly prescribes the type of information Immigration New Zealand may consider in character checks; Immigration New Zealand does not need to receive information from the Police that falls outside the defined criteria.

27. Given the breadth of the information potentially available, our view is that the lack of clear legislative or policy direction on how Police vetting checks are to be undertaken, or the manner in which Police responses should be provided, gives rise to uncertainties and legal risks for all parties. We think that there should be a clear statutory framework for vetting, and we support the proposal (currently under consideration by the Police) that a programme of work be undertaken to develop recommendations to Government for the enactment of legislation.

Findings and recommendations

Approved agencies

Ensuring only appropriate agencies access the Police Vetting Service

28. To become an approved agency, agencies must meet one or more of the following criteria:

    - the agency is a Government agency;
    - the agency has functions which involve community safety and security, for example, the care, protection, education or training of vulnerable members of society such as children, disabled people, and animals;
    - the agency has a specific legislative or other obligation to obtain a Police vet; and/or
    - the agency seeks a Police vet for immigration or foreign consular / visa purposes (the Police have agreements with a number of embassies and consulates that complete vetting requests for visa requirements, including agencies in Canada, Britain, Switzerland, the United States and Australia).

29. To register for the Police Vetting Service an agency is required to complete and sign the Approved Agency Agreement and accept the Police's terms and conditions for accessing the Police Vetting Service. The Agreement includes a requirement for the agency to ensure that the applicant has signed an authorisation for a New Zealand Police vet. Agencies must also draw the applicant's attention to the matters in the form that must be acknowledged and understood before he or she consents to a Police vet. The Agreement states that the Police may suspend or reduce the level of access to the Police Vetting Service where an Approved Agency has breached a provision of the Agreement.

30. We found that not all agencies on the 'approved agencies' list appeared to meet the stipulated criteria or have another clear statutory basis for accessing the Police Vetting Service. The Police have advised that they have started to work through the list of approved agencies to ensure they either have a statutory basis or otherwise meet the criteria the Police have set for agencies to be entitled to access the Police Vetting Service as an approved agency. We recommend that this work be completed as soon as practicable.

Reciprocal information sharing

31. In some cases, the agency requesting a Police vet may already hold information about an individual that would be relevant to the Police's decision on what information to release, particularly when considered alongside information held by the Police. For example, a potential employer or regulator may be aware that allegations of inappropriate behaviour were made about a person in their previous role, but that these were not investigated or upheld.

32. In such cases the Police may decide not to release the information they hold because it is unsubstantiated. However, if they had been aware of the full picture, they might have reached a different decision. We are aware of a small number of cases where it has become apparent after the completion of a vet that the agency held relevant information that increased the relevance of the Police-held information.

33. We recommend that the Police address this issue by making clear in Approved Agency Agreements that agencies making a vetting request must consider whether to advise the Police of any information already held by them that is relevant to the person's risk.

34. We also recommend that the Police develop and publish a policy setting out the steps that they would take to verify any such information, including the circumstances in which they would retain information on NIA. It should be noted that access to any such information Police retained would be subject to the Privacy Act and the Official Information Act.

Improving Police internal processes

A consistent decision-making framework for vetting and clear internal processes

35. Our review found that Police's internal decision-making framework for vetting is not clear. Procedural documents are disparate, do not always include the rationale for decisions, and sometimes have not been updated for many years. Currently the Police have no single, over-arching policy or procedural document that provides a consolidated overview of the entire vetting process for staff. This can lead to inefficiencies and inconsistent practices that are frustrating for front-line vetting staff.

36. A particular issue we observed at the start of this review was that decisions made on contentious applications, for example during Panel discussions, were not consistently fed back to vetting staff or included in updated procedure manuals or desk files. This created the risk that vetting staff would not be able to apply consistent reasoning on future similar applications.

37. The Police have made some improvements to their systems in this respect since our review started, notably by developing a more comprehensive Main Desk File and a decision register to consistently record decisions made on relevant policy and process issues. Nonetheless, we consider there is still a need to develop a more comprehensive and coherent set of guidelines and procedures to support consistent decision-making about what information to release as part of a vet.

38. Three issues in particular need to be addressed in such guidelines:

- The relevance threshold for the release of information (that is, the degree of relevance in demonstrating the risk which the vetting subject may present given the nature of the intended occupation or role) should be articulated. We recognise that this threshold may only be able to be specified in general terms and that there will be an element of subjectivity in its application. The threshold will also need to vary according to the nature of the risk posed. For example, a possible risk to vulnerable children should carry a lower relevance threshold than a possible risk to adults.

- There should be clear guidelines as to the nature of the information that can be relied upon, taking into account any relevant statutory criteria. In particular, the categories of information held by the Police that should never be taken into account for vetting purposes should be made clear (see further below, at paragraphs 88-93).

- The extent to which and the way in which supporting information should be substantiated and verified before being considered for release should be spelt out (see further below, at paragraph 104).

39. We recommend that the Police develop this framework as soon as practicable, make it readily available to their own vetting staff, and communicate it to approved agencies and, if requested, to vetting subjects. We also recommend the Police publish their decision-making framework on their website to ensure transparency in their procedures and certainty for all those involved.

Ensuring the Panel process is robust

40. The Review Panel is an important part of the Police's vetting process. However, at the commencement of the review we found that Panel processes were not always robust, despite the importance of the decisions being made. We noted that the Panel review process appeared to lack consistency. For example:

- while the composition of the Panel comprised staff from the Communications, Crime and Legal Groups, attendees from those Groups varied from one meeting to the next;

- the information relating to applications being reviewed was not provided to all Panel members for consideration in advance of their deliberations;
- the decision-making framework used to assess individual applications was variable;
- the level of detail that was ultimately reported to agencies differed from one case to another; and
- some decisions on policy or practice changes were incorporated into the Police's procedures, while others were not.

41. Since our review commenced, the Police have appointed a dedicated and experienced staff member within the Police Vetting Service to assist the Panel. This person is charged with reviewing the relevant Police files for each application, providing advice to inform a balanced and informed decision and preparing a draft release statement for the Panel's consideration. This approach has significantly improved the rigour and consistency of Panel deliberations.

42. However, at mid-2015 the new staff member was dealing with a four month backlog of approximately 280 files. Given the potential risks arising, both to applicants who may lose opportunities for employment and to agencies who may be unsure about the continued suitability of an incumbent subject to regular vetting, this creates an unacceptable delay in consideration of applications by the Panel. To help further address any backlog in applications, the Police advise that a second, part-time, person has recently been appointed to assist.

43. Police advise that some attempt has also been made to ensure continuity in Panel membership, although the volume of work and the frequency of meetings have made this difficult.

44. We recommend that:

- the Police ensure that the backlog of applications under review is resolved as quickly as practicable;
- the written decision-making framework recommended in the section above clearly sets out all parts of the Panel process (including the process by which applications are referred to the Panel);
- there is an agreed process by which changes to the policy can be made, so that ad hoc and incremental changes are not made orally from one Panel meeting to the next; and
- the membership of the Panel is clearly established and articulated, and greater effort is made to ensure that substitutes are kept to a minimum.

Ensuring fairness for vetting subjects

Ensuring Police are certain that authorisation has been obtained

45. Under the Approved Agency Agreement, it is made clear that the subject's authorisation is a condition of accessing the Police Vetting Service.

46. Police vets are carried out subject to the Privacy Act 1993. Unless the subject has authorised the release of the information, therefore, disclosing it is justified only if one of the exceptions to Principle 11 of the Privacy Act 1993 applies. This could include, for example, where the subject is an incumbent in or an applicant for a potentially high risk role and Police consider that disclosure is necessary to prevent or lessen a serious threat to public or individual safety (Principle 11(f)).

47. However, the Police do not routinely see signed consent forms. Instead, they rely on the applicant agency to ensure that authorisation has been given, and undertake random audits of compliance with the requirement to obtain authorisation. They may then revoke access to the Police Vetting Service if they discover that agencies are not complying with the authorisation requirement. We consider this is a reasonable approach given the volume of vetting applications processed each year.

48. We note, though, that the form submitted by the applicant agency confirms the existence of consent only by entering the date on which consent was obtained. We think that this poses a significant risk, since the entry of a date can readily become a mechanistic exercise without attention being paid to whether or not authorisation has been provided. We therefore recommend that the application form be modified so the applicant agency is specifically asked for confirmation that they have obtained authorisation, as well as for the date on which this was provided.

49. There have also been occasions where the Police have released information to agencies who have not verified their receipt of consent, including instances where the agency has been asked for a consent form but not provided one[2]. Police advised us that this is done as a "voluntary release" of information under the Official Information Act where the Police consider they hold relevant information of concern about the applicant.

[2] As noted in footnote 1, in circumstances where consent has not been provided, the Police Vetting Service may consider the request for information under the Official Information Act 1982.

50. We do not think this is an acceptable approach. Where information about an individual is requested under an Approved Agency Agreement and the existence of authorisation has not been confirmed by the applicant agency as part of the application, we recommend that the Police should not provide the information unless the applicant agency confirms the existence of authorisation or the Police are otherwise satisfied that the release of the information is justified under Principle 11 of the Privacy Act.

Ensuring that the person understands the nature of the authorisation

51. Our review of complaints received by the IPCA and the Privacy Commissioner indicates there is a general lack of awareness among the public of the level of detailed information that may be disclosed in a vet.

52. In general, vetting subjects raised concerns about the accuracy and relevance of information released (particularly in terms of whether the information released was unduly prejudicial). A common theme was whether the information gave a balanced account of a reported incident or its outcome (for example, where agencies were advised that charges had earlier been laid against an applicant, but were not advised that the vetting subject had subsequently been acquitted at trial of those charges). There were also complaints about the fact that the Police advised the requesting agency that they possessed relevant information but were not able to release it (for example, because of a confidentiality requirement or the existence of a suppression order). This was sometimes regarded not only as unduly prejudicial, but also as contrary to natural justice, since the vetting subject may not have known what the Police held and did not have an opportunity to respond to it.

53. Although the consent form was amended in 2014 to try and make clear the broad scope of vetting information that may be released, it appears that many individuals do not appreciate the scope of the information that the Police might hold, and that others confuse a full vet with a more limited criminal records check. For example, many job applicants may not expect information to be released about charges that had been withdrawn, where preliminary investigations did not progress to formal charges or prosecution, or (in rare cases) where they were the victim of or witness to a crime, rather than the perpetrator.

54. Confusion may arise from inconsistent use of the terms "Police vetting" and "criminal records checks" both in regulations and guidance issued by government agencies. For example, the Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015 require agencies to obtain a "Police vet", yet the title of the relevant section refers only to "information about previous criminal convictions." This imprecise wording may be leading to the perception of some people in

that sector that only information about criminal convictions will be released in a vetting response.[3]

55. The responsibility to ensure that the person being vetted understands what they are authorising rests with the agency responsible for obtaining consent. As noted above, the Approved Agency Agreement obliges agencies to direct applicants to the purpose and scope of the vetting check. However, the Police should also continue to explore ways to better educate vetting subjects about the scope of the information that may be included as part of a vet, for example, that it includes both conviction and any other relevant information that the Police may hold.

Reducing delays and notifying subjects and agencies of delays

56. Delays in finalising a vet beyond the expected timeframe of 20 working days can arise for a variety of reasons. The main reason applications are delayed is because of limited resources to process unanticipated increases in volumes of vetting requests. The Police may also seek additional information not held in the central database, such as hard copy files that need to be retrieved from regional offices and Police stations.

57. Delays in processing applications were a key concern for the agencies we interviewed. A number of agencies noted that delays can be seen as indicating that the applicant's background raises concerns, rather than simply indicating a potential administrative backlog in processing requests.

58. When we commenced this review we were advised that Police practice was to notify agencies that applications were delayed and to provide an explanation (including reasons such as 'charges are pending' or 'the applicant is under investigation'). We consider such an approach could be unduly prejudicial.

59. The Police have advised us that the current text used to inform agencies of delays does not include reasons as to why the application cannot be processed promptly.

60. The Police have invested considerable effort in reducing delays. Increases in staff numbers and enhancements to the electronic processing of applications have helped to shorten processing times and reduce backlogs. The Policing (Cost Recovery) Amendment Bill, currently before the House, would allow the Police to charge for vetting services, thus allowing the investment of additional resources. This may help further reduce and avoid delays in processing vetting applications.

61. We appreciate that it would not be feasible for the Police to proactively contact all individuals who are the subjects of a delayed application. For example, Police advise that around 10,000 vets get reviewed and unexpected spikes in demand could result in irregular increases in the number of delayed applications.

[3] Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015, regulation 11.

62. We recommend, however, that the Police should, in certain circumstances (such as where there is an active investigation that prevents the immediate release of information), notify the subject of a vet in the first instance where an application will be delayed. In some cases, the individual may prefer to withdraw their application, rather than have their potential employer alerted to the fact that their vet has raised issues causing a delay, particularly if they have the opportunity to apply for the job again once court proceedings or other matters are resolved. The individual may also decide to proactively disclose the information themselves, in order to facilitate an open discussion with a potential employer.

Advance warning for subjects previously given a 'clean' vet

63. In 2013, as a result of the transfer of the vetting function to a different section within the Police and a consequent review of the way in which the function had been undertaken, the Police developed more detailed criteria about the threshold for the release of information in order to ensure greater consistency of decision-making. In practice, this resulted in an overall lowering of the threshold, which in turn resulted in the disclosure of information that previously would not have been released. For people in occupations subject to regular vetting (such as taxi drivers), this change has meant that more information has been disclosed through vets done after 2013 than had previously been the case. Some people with previously 'clean' vets have had adverse information released. This has, in some cases, contributed to them losing their employment. Instances of this issue will reduce over time as people subject to routine vets before 2013 are vetted repeatedly under the new threshold.

64. In response to concerns raised during investigations of complaints to the IPCA and the Privacy Commissioner and during this review, the Police have advised that they are now notifying individuals (who had previously received a clean vet) in advance if they are proposing to release an adverse comment based on information they have previously withheld, and are inviting them to comment.

65. We regard this as a positive step, as it gives the individual involved a chance to comment on information that may adversely affect their prospects, to refute information they consider is inaccurate, or to provide a statement of correction if they consider the information misleading (as provided for by principle 7 of the Privacy Act). We also commend the recent extension of the timeframe for response by the individual concerned from less than a week to 10 working days, which allows the individual more opportunity to engage with the Police effectively.

Advance warning for adversely affected subjects

66. We recognise that it would be impracticable for the Police to always give individuals advance notice if an adverse comment is to be provided to an agency. The Police have advised that in 2015 approximately 1,850 written notes were included in vetting responses provided to agencies. Giving individuals advance notice in all cases where a written note is to be provided would require a substantial increase in resources, and even then could have the undesirable consequence of creating further delays in the vetting process. In any event, advance notice is often unnecessary, since individuals will, in most cases, already know that the Police may hold adverse information about them that is liable to be released.

67. However, in our view advance notice should be given in every case where the Police know or have reasonable cause to believe that the release of the information will not be expected by the individuals concerned. This may be, for example, because the Police are aware that an investigation into suspected criminal offending was earlier undertaken but the individual was not interviewed. Advance notice in these circumstances would give the individual the opportunity to comment on the information (and to have this comment included in the release), to proactively discuss the information with the agency, or to withdraw their employment application if their preference is that the information not be disclosed. It may also be an important step in verifying the accuracy of information.

68. We therefore recommend that the Police give advance notice of the proposed release of information, and give individuals a reasonable opportunity to comment, in every case where 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 Police, will not be expecting the release of that information in the context of a vetting application.

Ensuring appropriate information is released

The release of information subject to suppression orders

69. Suppression orders prevent the publication of information subject to the order. Courts can impose suppression orders for a range of reasons, including to prevent hardship to the victim, the defendant, their families or others connected to a case. Suppression orders can be varied by the court if, for example, the original purpose of the suppression order ceases to apply.

70. The Police do not usually release information subject to a suppression order through the vetting process. However, they have advised us they do provide some suppressed information to government agencies, as they do not consider that disclosing information to a government department, for vetting purposes, constitutes "publication". They note that when information is released to approved agencies in the private sector, particularly within small communities, the risk of subsequent disclosure to a wider audience is heightened.

71. We do not regard this as a good enough reason to distinguish between government departments and other approved agencies. If the information is relevant and substantiated, the test is whether its release by the Police amounts to publication. If it does not, it should be released. A distinction between public sector and private sector agencies cannot sensibly be drawn.

72. Any concern that the agency to whom the information is sent might advertently or inadvertently publish it to others for unauthorised purposes should be addressed by giving the agency an appropriate warning that such publication would be in breach of the suppression order and might render them in contempt of court.

73. The Court of Appeal recently considered the issue of "publication" of information subject to suppression, noting that the meaning is flexible and depends on the circumstances but refers to dissemination to the public at large, rather than to persons with a genuine interest in conveying or receiving the information. In interpreting section 200 of the Criminal Procedure Act 2011 in the employment context[4], the Court agreed with the view taken earlier by the Employment Court[5] that, where an order forbidding publication of information has been made, it is not a "publication" to make disclosure of that information to that person's employer where the employer has a genuine interest in that information.

74. It would be desirable if there were greater legal clarification of the circumstances in which an applicant agency has a genuine interest. We note that the Supreme Court on 18 August 2016 granted leave to appeal against the Court of Appeal decision. Even if the appeal is dismissed, we hope that the Supreme Court can provide more specific guidance in the context of that appeal.

75. In the meantime, we think that the Police should not simply apply the ordinary relevance and substantiation thresholds to information that is subject to a suppression order. A somewhat higher test ought to be applied.

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[4] *ASG v Hayne, Vice-Chancellor of the University of Otago* [2016] NZCA 203 [16 May 2016]

[5] *Hayne v ASG* [2014] NZEmpC 208 [EC judgment].

76. In circumstances where the Police Vetting Service is aware that a court has made a final suppression order to protect a vetting subject who has been acquitted, on the basis that publication of the person's name or the circumstances of the proceedings might have a prejudicial effect on the individual's future, there should be a strong presumption against release.

77. We recommend that the Police should release suppressed information to any applicant agency (whether public or private sector) only if it is unequivocally and substantially relevant to the risk that the person may pose in the position for which they are being considered. In determining that, the Police should take into account whether there would be an expectation that the vetting subject would themselves be likely to have a good faith duty to disclose the information to the agency under the Employment Relations Act 2000.

Disclosure of the existence of information that cannot be released

78. It follows that there will be cases where the Police hold suppressed information that they consider relevant to a vet, but that they cannot release to the agency. Similarly, they may hold relevant information that cannot be released for other reasons, for example, because a criminal investigation is underway but the applicant/alleged offender has not yet been interviewed or because the information was received in confidence.

79. When this review commenced in late 2014, the Police practice was to use a 'red stamp' in such situations. In 2014, 50 vetting applications were 'red stamped', meaning the results of the vet included the statement that the subject should "*not have unsupervised access to children, older people or other vulnerable members of society*" on the basis of information that could not be released, and therefore could not be questioned or refuted by the individual concerned.

80. In mid-2015 the Police stopped issuing 'red stamps'. In its place, in these circumstances, Police vetting results have since then included a statement advising:

    "*Police holds relevant [conviction/non-conviction – delete one] information about the applicant that it is unwilling or unable to release because disclosure would breach a Court order or statutory provision (such as name suppression or Youth Court outcomes) or otherwise be likely to prejudice the maintenance of the law – for example, it was provided to NZ Police with an expectation of confidence, or is in the nature of intelligence, or relates to an active investigation or an individual's safety. No details of the relevant information will be disclosed to you by the Police Vetting Service. The applicant may or may not be aware of the information, and in some circumstances may have been advised already that the vetting result would comprise the above statement*."

81. We are concerned that the revised statement has the same effect as the red stamp approach. The statement is prejudicial and is likely to adversely affect the individual concerned, as it indicates to agencies that the person may be a risk, but provides no means for them to make a judgement about this. It also does not provide the individual with any means of explaining or refuting the information concerned. The practical effect is likely to be that any individual with this statement attached to their vetting report will almost certainly fail in their application. In such circumstances, the Police could be seen as acting without due regard for natural justice, in breach of section 27 of the New Zealand Bill of Rights Act 1990.

82. The revised statement is of particular concern if there is a suppression order in place due to concerns by the Court as to the reliability of the evidence given against the individual, as has been the case in some of the complaints we have examined.

83. We recognise that the Police are often unaware of the reasons why a suppression order was made, and are generally not in a position to find out because this information is often not recorded or is not readily available. However, we do not think that this is a good enough reason to provide prejudicial material that potentially undermines the reason why the suppression order was made.

84. Occasionally it may be possible for the Police to undertake some further investigation, including consultation with individuals or officers who have been the source of information on the file, so that a meaningful substantive response to the vetting request can be made. Otherwise, it is our view that the existence of the information should not be disclosed.

85. We acknowledge that this presents the Police with an irreconcilable dilemma, since they may be in possession of information suggesting that the person would pose an unacceptable risk if they were appointed to the position, or received the licence, for which they are applying. However, the fact remains that advice to the applicant agency that such information exists, without informing the person of its nature or giving them an opportunity to respond, is a fundamental breach of natural justice and poses a substantial risk that their livelihood or career may be destroyed by allegations that could have been rebutted if they had been known.

86. This can only be satisfactorily resolved by the development of a comprehensive statutory framework governing the vetting function. In the absence of that, we think that the Police must discontinue their practice of advising agencies that "*Police holds relevant [conviction/non-conviction – delete one] information about the applicant that it is unwilling or unable to release*". We recommend accordingly.

87. We note it might be helpful for the Police to ensure that all agencies approved to use the Vetting Service are aware that the Police *may* hold relevant conviction and/or non-conviction information about an applicant that they are unwilling or unable to release. This could be clearly explained under the Approved Agency Agreements, or in advisory material, so all agencies are aware of the limits of what they may receive.

Disclosure of mental health information

88. The Police may hold information about an individual that is not related specifically to offending. For example, situations may arise where the Police have contact with people in apparent mental health crisis. In such cases, information about the person's mental health may be included in Police files. Determining whether this information is relevant to their suitability for employment in a particular role requires specialist expertise. For example, whether a person's past mental health issues mean they are likely to be a risk to others in the future is a clinical judgement. The Police should not include such health information in the results of a vet.

89. Police have previously released information related to an individual's mental health as part of the results of a vet on the grounds that it is relevant. The Police have advised us that they are concerned that they may be the only holder of information that is relevant to a job applicant's suitability, and it is vital therefore that they be able to release it.

90. The problem that arises is how to determine what is "relevant". In the case of mental health information, assessing whether a person's past mental health or related behaviour is relevant to whether or not they pose a risk in a particular role requires clinical expertise. Police vetting staff are not qualified to make such assessments. We therefore do not consider it is appropriate for the Police to release, in a vetting response, information about the mental health of an individual where this information has been recorded in a non-criminal context and there is no evidence of any link between the individual's health and any offending or direct risk to any other individual.

91. This problem arises, in part, due to the lack of a statutory framework for vetting. It also arises because the Police consider any information that they hold to be included in the scope of information to be considered for vetting. The Police proceed on the basis that responsibility for assessing suitability for a job remains with the employer and that the results of a Police vet are just one source of information. As we have already made clear, in most cases this does not reflect the reality.

92. In our view, if a person’s mental health is relevant to their suitability for a role, the employer should separately require that candidates undergo an independent medical or mental health assessment. It is not for the Police to provide such information.

93. We therefore recommend that Police do 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.

Ensuring information is relevant and substantiated

94. 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. As discussed in paragraphs 65 and 67, this may include giving affected individuals the opportunity to challenge the accuracy and relevance of information before it is released if there has previously been a ‘clean’ vet or the Police know or have reasonable grounds to believe that the affected individuals do not know the information exists or will not be anticipating its potential release.

95. The IPCA and the Privacy Commissioner have received complaints about inaccurate, incomplete, misleading or otherwise untested information being released as part of a Police vet. In particular, concerns have been raised about the release of information about charges that were dismissed or resulted in an acquittal. We have also received complaints where the Police did not have sufficient documented evidence to show that they took reasonable steps to ensure that information was accurate and not misleading.

96. The Police Approved Agency Agreement notes, that

“*to the extent permitted by law, all information provided in the Result is made available for use on the following conditions: NZ Police makes no representation of any kind without limitation in respect of accuracy; and, the information in the Result should form only one part of any process for determining an Applicant’s suitability for any entitlement, profession, undertaking, appointment or employment.*”

97. Police advise that this statement is intended to indicate to agencies that the information Police holds may have limitations and they should conduct their own risk assessment. However, the Police still have an obligation under Principle 8 of the Privacy Act to ensure that information is accurate and not misleading before disclosing it. Agencies have indicated to us that they regard information provided by the Police as accurate, and rely upon it in making employment decisions.

98. Our view is that the Police cannot shift the responsibility for ensuring information is accurate and relevant onto the receiving agencies, who have limited ability to check or verify the information provided to them by the Police. However, there are problems for the Vetting Service in making assessments of accuracy and relevance.

99. First, where information is held on NIA about suspected offending that has not resulted in a prosecution, or has led to dismissal or acquittal, there is often little or no information about the reasons why this occurred. For example, in the event of a prosecution that resulted in a dismissal or acquittal, there will often be no information as to the reasons for the Court's decision and little other basis for determining whether the alleged offending occurred on the balance of probabilities.

100. In preparing an application for review by the Panel, vetting staff will prepare a summary of matters they consider to be relevant from the investigation file, including any comments by investigators and the Crown Solicitor that may be held on the record. Even so, to some extent, the Police vetting decision is made in a vacuum if the outcome of the matter that brought the individual to the notice of the Police has not been noted on the file before it was closed.

101. Our review of the decision-making process indicated that a lack of information may result in no disclosure being made, but may also lead to release of material that has not been fully tested, the direction taken dictated by the extent to which the Panel members consider the information on file may help the agency concerned better assess the potential risk posed by the individual concerned.

102. We recommend that the Police institute a policy of requiring investigative staff, before files are closed, to enter into NIA brief details of the reasons why investigations are discontinued or charges are dismissed or result in acquittal, together with an assessment of any other information that substantiates or refutes the allegation.

103. Secondly, there is a lack of clarity about the standard of proof that applies in determining whether information is "substantiated". When we commenced this review, the Police advised us that in assessing whether to release information they consider relevant, they consider that behaviour is "substantiated" where the information held indicates the alleged behaviour is "more likely than not to have occurred". This is a lower threshold than that required for criminal proceedings where an allegation must be proven beyond reasonable doubt and therefore encompasses information beyond an individual's criminal record.

104. We agree that the standard ought to be lower than the criminal standard, but consider that a uniform "balance of probabilities" standard is not appropriate and does not accurately reflect Police decision-making in practice. As noted above (paragraph 38), the level of substantiation required to justify the release of relevant information should be spelt out. It should 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.

105. 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. We recommend that, whatever substantiation thresholds are being 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.

Conclusion

106. We thank the Police for inviting the IPCA and the OPC to review the Police Vetting Service, and for its cooperation with the review team. We commend the Police for the steps that they are already taking to address a number of issues identified during the review and the recommendations made here.

107. We acknowledge that the Police already process a huge volume of vetting applications each year, and that the vast majority of vetting applications are processed quickly and without issues.

108. However, we have identified a number of issues that expose the Police, agencies and vetting subjects to risk. Our recommendations are intended to strengthen the efficiency and integrity of the vetting system, and to ensure that the Police are operating the Police Vetting Service within the intent and letter of the law.

Appendix A: List of Recommendations

A statutory framework for vetting

1. Consideration should be given to developing a clear statutory framework for vetting.

Approved agencies

2. The Police have started to work through the list of approved agencies to ensure they either have a statutory basis or otherwise meet the criteria for being an approved agency. That work should be completed as soon as practicable, so that there can be assurance that agencies accessing the Police Vetting Service are entitled to do so.

Reciprocal information sharing

3. The Police should make clear in Approved Agency Agreements that agencies making a vetting request must consider whether to advise the Police of any information already held by them that is relevant to the person's risk.

4. The Police should develop and publish a policy setting out the steps that they would take to verify any information provided by an Approved Agency, including the circumstances in which the Police would retain information on NIA.

Improving Police internal processes

5. The Police should develop an internal decision-making framework as soon as practicable, make it readily available to their own vetting staff, and communicate it to approved agencies and, if requested, to vetting subjects. This decision making framework should be published on the Police website.

6. The Police should ensure that the current backlog of applications under review is resolved as quickly as practicable.

7. The decision-making framework referred to above should clearly set out all parts of the Review Panel process; there should be an agreed process by which changes to the policy can be made, so that ad hoc and incremental changes are not made orally from one Panel meeting to the next; and the membership of the Panel should be clearly established and articulated.

Ensuring fairness for vetting subjects

8. The application form should be modified so the applicant agency is specifically asked for confirmation that they have obtained the vetting subject's authorisation, as well as for the date on which this was provided.

9. Where information about an individual is requested under an Approved Agency Agreement and the existence of authorisation has not been confirmed by the applicant agency as part of the application, the Police should not provide the information unless the applicant agency confirms the existence of authorisation or the Police are otherwise satisfied that the release of the information is justified under Principle 11 of the Privacy Act.

10. In some circumstances (such as where there is an active investigation that prevents the immediate release of information), the Police should notify the subject of a vet in the first instance where an application will be delayed.

11. The Police should give advance notice of the proposed release of information, and give individuals 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.

Ensuring appropriate information is released

12. The Police should discontinue the practice of differentiating between private sector and government agencies in relation to the release of suppressed information.

13. Suppressed information should be released only if the applicant agency has a genuine interest in knowing that information. The applicant agency should be regarded as having a genuine interest only if the information is unequivocally and substantially relevant to the risk that the person may pose in the position for which they are being considered. In determining that, the Police should take into account whether there would be an expectation that the vetting subject would themselves be likely to have a good faith duty to disclose the information to the agency under the Employment Relations Act 2000.

14. The Police should not disclose to an agency that prejudicial information that they cannot release exists.

15. The Police should not release any information about the mental health of an individual where there is no evidence of any link to offending behaviour or likelihood of risk to others.

16. The Police should institute a policy of requiring investigative staff to enter into NIA brief details of the reasons why investigations are discontinued or charges are dismissed or result in acquittal, together with an assessment of any other information that substantiates or refutes the allegation. If consideration is being given to the release of information about allegations in the absence of such information, the Police should, where it is practicable to do so, undertake further investigations to determine whether the relevant substantiation threshold is met.

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.

Appendix B: International comparison

1. Although New Zealand's police vetting system has room for improvement, it is not generally too far out of step with other comparable jurisdictions, many of whom provide vetting that operates alongside legislation enabling some offenders to conceal minor, or older, 'spent' convictions in some circumstances (equivalent to our Clean Slate scheme). All jurisdictions we looked at placed restrictions on appointment of child sex offenders, including legislation requiring criminal checks for federal employees in positions involving interactions with children. For example, most Australian states have some form of pre-employment registration or clearance scheme (for example, Victoria's Working with Children Check) that operates in a similar manner to New Zealand's Vulnerable Children Act. Queensland's "blue card" screening assesses a person's eligibility to hold an exemption ("blue card") based on their past police interactions and automatically disqualifies people with certain convictions from working with children.

2. Similarly, in New South Wales, the Office of the Children's Guardian provides a record check that results in individuals being allocated either a "clearance" to work with children or a "ban" (without providing details of the information used to inform these classifications). Both spent and unspent convictions, charges and juvenile offending records can be considered, as well as general interactions with the Police.

3. Many jurisdictions provide for cost recovery for vetting services. Many also require ongoing monitoring and options to revoke approvals if new contrary information comes to light. For example, the Queensland Police monitors the information it holds about both blue card holders and applicant agencies. Service providers and card holders are also monitored to ensure they are meeting their obligations and if information changes and indicates increased risk, immediate steps can be taken to protect children from harm.

4. No examples were found where legislation has been introduced overseas to prescribe the detail of a police record check. However, internationally, the use of structured guidelines to inform decision-making is increasing. For example, in Canada, all provinces operate some form of pre-employment police records check. As with New Zealand, the framework for vetting is not defined in statute. However, information releases are informed by model policy guidelines developed by the Ministry of Justice in consultation with bodies such as the provincial Information and Privacy Commissioners and endorsed by the Association of Chiefs of Police of British Columbia.

5. In Canada, and in Australia and the United States where federated systems give rise to variations between states or districts, there have been calls for better alignment across jurisdictions and recommendations for greater statutory specificity in the use of Police records for secondary purposes.

6. Recent reviews in the United Kingdom and Canada found that, despite detailed guidelines, intelligence information from police files was often released with no evidence of better employment decisions, and despite clear indications the process may adversely affect subjects' employment opportunities.

7. The need to protect the rights of vetting subjects, as well as those potentially at risk, is increasingly acknowledged. For example, EU Directives include specific safeguards to preserve 'protection of individuals' which limits release of non-conviction information to non-core sectors and prevents release of any mental health-related information.

8. In the United Kingdom three levels of information and background checks are available: a basic criminal records check (similar to New Zealand's Ministry of Justice convictions history report); a more detailed check required for admission to certain professions requiring registration; and an enhanced records check for individuals working in the vulnerable sector, including disclosure of non-conviction information. Under the United Kingdom's Policing Act 1997, record checks are conducted by a centralised government body, the Disclosure and Barring Service (DBS). The DBS acts as a collation and disclosure bureau, sending information to the individual and employer at the same time. Decision-making relies on two main guidance documents: the Quality Assurance Framework and the Statutory Disclosure Guidance, the latter developed in response to recommendations from a three-phase review of the criminal records regime conducted by Sunita Mason, the Government's Independent Advisor for Criminality Information and reflects the requirements of the Protection of Freedoms Act 2012.[6]

9. In brief, Mason recommended introduction of tighter controls on use of information held on the Police National Database, along with a more principled approach to access and disclosure, to appropriately support public protection arrangements without unduly infringing individual rights.

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[6] *A Balanced Approach - Safeguarding the public through the fair and proportionate use of accurate criminal record information*. Independent Review by Sunita Mason, March 2010, accessible at http://webarchive.nationalarchives.gov.uk/20100418065544/http:/police.homeoffice.gov.uk/publications/about-us/ind-review-crim/a-balanced-approach-12835.pdf?view=Binary. See also:

- *Drawing the line: A report on the government's Vetting and Barring Scheme.* Roger Singleton. Independent Safeguarding Authority (UK) 2009, accessible at http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/DCSF-01122-2009.pdf
- *A Common Sense Approach. A review of the criminal records regime in England and Wales.* Sunita Mason Independent Advisor for Criminality Information Management. Report on Phase 1. UK Government Home Office, February 2011, accessible at https://www.gov.uk/government/publications/criminal-records-regime-review-phase-one.
- *A Common Sense Approach. A review of the criminal records regime in England and Wales*. Sunita Mason. Independent Advisor for Criminality Information Management. Report on Phase 2. UK Government Home Office, November 2011, accessible at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97893/criminal-records-review-phase2.pdf

10. Mason recommended the introduction of a package of measures to improve the disclosure of police information to employers, including development and use of a common template to ensure that a consistent level of information is disclosed to the individual with clearly set out reasons for that decision. Other key recommendations included that: eligibility for criminal records checks should be scaled back; criminal records checks should be portable (transferable) between jobs and activities; and an online system should be introduced to allow employers to check if updated information is held on an applicant. Mason further recommended that access to criminal records via the PNC should only be granted where it is necessary for public protection or criminal justice purposes, that all such access should be based on appropriate business cases and supply agreements, and that all existing supply arrangements should be reviewed within 12 months to check they conform to the defined eligibility standards.

11. Similarly in Canada, in April 2014, an independent investigation into the use of Police Information Checks by the Information and Privacy Commissioner recommended the need for fundamental changes to the way police vetting operates in British Columbia.[7] The Canadian review found that, despite the development of agreed guidelines, non-conviction history and particularly mental health information is routinely released without any evidence that this results in better hiring decisions. The reviewers considered that it was not appropriate to leave risk assessment decisions to employing agencies, or to rely on the ability of individuals subject to record checks to be able to dissuade potential employers that adverse information provided by the Police was not pertinent. In the absence of refuting evidence or explanatory context, agencies would be unlikely to take on board an unquantified and unqualified risk, particularly where other equally qualified candidates were available. The report recommended that in the immediate future, both government and the Police should develop tighter policies and procedures to ensure only information relevant to the position applied for is released. No non-conviction information should be released to non-core sectors; no mental health information should be released in any police check, and long-term, legislation should provide for a centralized office for all vetting for vulnerable sector employees.

12. The recommendations from this review are consistent with these international findings. Their implementation will help ensure alignment between New Zealand's processes for Police vetting and international practice and support innovative new cross-sector initiatives aimed at providing a more holistic approach to community protection.

[7] *Use of Police Information Checks in British Columbia.* Investigation Report F14-01. Elizabeth Denham, Information and Privacy Commissioner, 15 April 2014 – [2014] B.C.I.P.C.D. No 14., accessible at https://www.oipc.bc.ca/investigation-reports/1631.