

Consultation Response

Employment practices
and data protection:
recruitment and selection

March 2024



Consultation Response

Employment practices and data protection: recruitment and selection

March 2024



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the ICO consultation: [Employment practices and data protection: recruitment and selection](#).¹

It is worthwhile noting that the Employment Law sub-committee does not have designated data specialists and our focus relates to employment law practices and policy based implications based on the experience of the Committee and our likely experience of using the guidance.

The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Q1 How far do you agree or disagree that the draft guidance is clear and easy to understand?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree
- 4 – Strongly disagree
- 5 – Unsure/don't know

Overall, the guidance is clear and easy to understand to those that are not data specialists but who might have a need to understand data principles and expectations arising from recruitment and selection.

However, we do think that some areas could do with being improved:

- **Criminal record data:** we've noted that this is covered in various places in the guidance and we think it would be helpful if this was addressed in one place. Having a dedicated section would be more accessible and easier to understand. There are not many practical examples in relation to lawfully processing criminal record data and we think more would be helpful.
- **Health information and reasonable adjustments:** we would similarly suggest a dedicated section which deals with health information in an end-to-end manner so that it's more accessible and easier to understand. We appreciate that the ICO has other guidance on health information so an alternative would be to more obviously cross-refer to that whilst still contextualising it for the purposes of

¹ [ICO consultation on draft employment practices – recruitment and selection | ICO](#)
Employment practices and data protection: recruitment and selection



recruitment and selection. More practical examples would be beneficial and further clarity around what is considered to be health information for the purposes of being special data. For example, if a person or previous employer through a reference discloses a sickness absence history but does not provide any other information around the reason for that, then would this amount to health information, and would the frequency or duration of the sickness absence alter any considerations. It would seem to us that an impairment (whether that be physical or mental) could be inferred if absences persisted for a long period but that any “information” about the type of impairment would not be.

Q2 How far do you agree or disagree that the draft guidance adequately covers the end to end recruitment and selection process and the data protection implications linked to this?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree
- 4 – Strongly disagree
- 5 – Unsure/don't know

Generally, there is more guidance on end-to-end recruitment and selection than what we have previously had, so it moves us forward, and is easy to understand and is accessible.

However there appears to be a few omissions which we think some employment practitioners would expect to be covered. In particular, there are no sections or specific considerations given to:

- **Internal recruitment.** It seems odd that no specific reference is made to this. Internal recruitment can raise complex issues because of the existing data held by the employer. Whilst some of the guidance could be read-across to apply to internal recruitment, this is not obvious. Furthermore, matters such as internal references (unsolicited, informal or formal); deemed knowledge of performance issues, skills, disabilities or health conditions which might otherwise impact suitability for role or ability to provide a role; controls over recruitment data; re-purposing existing data for the purposes of recruitment; handling rectification or objection requests; and handling unsolicited trade union membership information all seem relevant here. A section or more examples that deal with internal recruitment specifically (and even intra-group recruitment where there might be data sharing agreements) would be helpful.
- **TUPE transfers.** Whilst this is not traditionally thought of as “recruitment”, it is a way in which employers will inherit employees and which will trigger validation and vetting practices. Therefore if the opportunity is not taken to include such a reference, then we’d suggest that additional guidance be provided elsewhere by the ICO.
- **Fraud databases.** There is mention of criminal, professional and social media checks but there will be other checks regularly used in some sectors that is worthy of mention and consideration. Whilst there is a light-touch reference to fraud databases on page 18, it would also seem appropriate to refer to this in more detail under the pre-employment vetting of candidates section.



Q3 How far do you agree or disagree that the draft guidance contains the right level of detail?

- 1 – Strongly agree
- 2 – Agree
- 3 – Disagree
- 4 – Strongly disagree
- 5 – Unsure/don't know

Overall, the guidance is sufficiently detailed to explain the issues whilst balancing the need for it to be easy to understand and accessible to the majority of people.

However, we would suggest additional detail in the following areas:

- **Regulated sectors:** it is unclear what onus can be placed on requirements set by a particular Regulator to meet the processing ground of a legal obligation, and how those requirements might impact upon pre-employment vetting. For example, in heavily regulated sectors, there will be expectations set which businesses will need to comply with, or which dictate good practice in that particular sector. The examples given refer to childcare and healthcare sectors which are more commonly understood but it would be helpful if broader examples were given from other sectors such as financial services and others, where the “laws” or “regulations” are less obvious. There is an opportunity for the ICO to outline the considerations it would expect a business to take when deciding whether recognised interpretation of regulatory requirements is sufficient to establish any particular processing ground.
- **Diversity, Equity and Inclusion:** given the huge focus on this for many employers, we think that additional practical examples would support better understanding, particularly as it relates to special category information. Examples would include understanding the difference between ethnicity and nationality, whether applicant names could disclose cultural/ethnicity backgrounds, whether school names could suggest a particular religious belief, membership of organisations which might disclose certain philosophical or political beliefs, recording gender and how to respond to any rights to rectify/erase, and reviewing the examples around positive action to provide guidance on how employers might be expected to include in a transparency notice.
- **Social media checks:** the guidance could be more detailed with additional practical examples. For example, where would the line be drawn by someone making something publicly available or not and what factors should be considered to identify that; and how would a business reconcile automated AI which assesses social media with the need to invite challenge from the individual.
- **Employment, social security and social protection:** for the processing of special category data (e.g. medical information), a lawful basis and condition is required for the processing to be lawful. We understand that consent is unlikely to be appropriate and so the other “condition” which can be relied upon is “employment, social security and social protection (if authorised by law)”. However we think some examples of how this applies would be helpful to improve understanding.
- **Privacy and Electronic Communications Regulations (PECR):** whilst this will be familiar to data specialist who we appreciate may be the more likely users of this guidance, we think that there needs to be further explanation around this and how this is to be considered during recruitment and selection. The example re direct messages on LinkedIn is not explained in sufficient detail for the user



to understand why PECR applies or the implications so that those considerations can be applied to other scenarios.

Q4 How easy or difficult is it to find information in the draft guidance?

- 1 – Very easy
- 2 – Easy
- 3 – Difficult
- 4 – Very difficult
- 5 – Unsure/don't know

Please see our comments above regarding suggestions to provide a designated section for criminal records checks, health information and internal recruitment. However the user experience has not been tested by us to comment further.

Q5 Please provide details of any cases, examples, scenarios or online resources involving recruitment and selection that would be useful for us to include in the guidance.

Please see our comments above.

Q6 Please provide any other suggestions for the draft recruitment and selection guidance:

We have the following additional comments:

- **Impact assessments:** The guidance appears to suggest that a legitimate interests impact assessment should be carried out at the outset of all recruitment processes, where this lawful basis is relied upon. It is unclear to us whether this is intended to be for every individual recruitment process and if not, we think it would be helpful if this was clarified with examples for where this would be needed.
- **Consent and withdrawing from process:** The guidance refers to “If a person withdraws their consent, they will also withdraw from the recruitment process”. We wonder if this is an oversimplification because consent may have been relied upon for only part of a recruitment process and it might not be a proportionate reaction to suggest that someone is withdrawing from the recruitment process. To ensure consistent application, we think this could be brought to life more with an example.
- **Reasonable adjustments:** There is a reference on page 20 under the heading “Do we need to make reasonable adjustments in the recruitment process” which says “if a person needs particular consideration given their circumstances, you **must** accommodate them”. This does not accurately represent the duty to consider “reasonable adjustments” under the Equality Act 2010 and suggests an absolute obligation to any adjustment. Assuming that this was not intended then we suggest that it be clarified further. We appreciate that there is another sentence on page 21 which explains “[w]hat is reasonable will depend on someone’s specific needs and you **must** be certain about exactly what reasonable adjustments are required” but consistent terminology would encourage better understanding and compliance.
- **Retention of records:** there is a general reference to prescription legislation but we wonder if this should be caveated further to accommodate other legal or regulatory requirements which might impact a business’ decision to retain records, such as any duty of disclosure as part of ongoing legal proceedings, or other regulatory reporting requirements.



- *Inferences*: On page 11 it refers to someone being capable of drawing an inference from the information provided by a candidate. We think it might be helpful to explain when such an inference might result in processing personal data. Even where it does not result in “processing” it would be prudent to explain that it might still be a factor when deciding what data is required (i.e. which might lead to an inference) and defending any employment law allegations of discrimination or unfair treatment.
- *Consent*: on page 12 it is not clear why the example is demonstrating principles of consent. We appreciate that it demonstrates necessity and proportionality in the recruitment process, but we think a better example of when consent is appropriate would be better.
- *International aspects*: it would be useful to explain the scope of the note and that employers might have other data obligations arising from other jurisdictions which this note is not intended to cover.
- *“Highly sensitive information”*: The reference on page 22 could be explained further so that there is wider understanding of what this could potentially include.
- *“This is unlawful”*: the reference on page 42 ought to be explained further.

Q7 Do you use social media for recruitment and selection purposes?

Not applicable

Q8 Do you use AI or other technologies to process personal information for recruitment and selection purposes?

Not applicable

Q9 How far do you agree that the impact assessment summary adequately covers the main affected groups?

Unable to answer due to lack of practical exposure

Q10 How far do you agree that the impact assessment summary adequately outlines the main impacts?

Unable to answer due to lack of practical exposure

Q11 Are you responding to this consultation on behalf of an organisation?

1 – Yes

2 – No

Q12 Who in your organisation needs to read the guidance? (Please provide job titles or roles and how many people in those roles would be expected to read it, not people’s names)

Not applicable

Q13 To what extent (if at all) do data protection issues affect strategic or business decisions within your organisation?

Not applicable



Q14: Do you think the draft recruitment and selection guidance would result in additional costs or benefits to your organisation? (These could be financial or non-financial and might include staff time)

Not applicable

Q15 Could you please describe the types of additional costs or benefits you might incur?

Not applicable

Q16 Can you provide a rough estimate of the costs or benefits you are likely to incur and briefly how you have calculated these?

Not applicable

Q17 If there is any other evidence or information on the potential impact of the guidance or our impact assessment summary that you would like us to consider, please provide it in the box below. This could include a description, links to other sources, or contact details where we can reach you to discuss further.

Not applicable

Q18 How did you find out about this consultation?

ICO website

ICO Twitter account

ICO Facebook account

ICO LinkedIn account

ICO staff member

ICO newsletter

colleague from your organisation

person outside of your organisation

other

If other please specify:

Q19 Who are you responding as?

(please tick all that apply)

an organisation or person employing workers

a recruitment agency

a representative of a professional, industry or trade association

an organisation representing the interests of employees, workers, self-employed (eg charity, employment advocacy organisation)

an employment rights professional body or advice service



- a trade union
- an academic
- a supplier of employment technology solutions (eg monitoring software or HR systems)
- an individual acting in a private capacity (eg someone providing their views as a member of the public)
- an ICO employee
- other

If other please specify:

Q20 Please provide the name of your organisation:

Law Society of Scotland

Q21 What is the size of your organisation?

- Micro-organisation (less than 10 members of staff)
- Small or medium organisation (10-249 members of staff)
- Large organisation (250 members of staff or above)
- Not applicable or not sure

Q22 Finally, we may want to contact you about our employment practices guidance and some of the points you have raised. If you are happy for us to do this, please provide an email address:

policy@lawscot.org.uk



For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk