



Stop the “Rolling Bad Apples”: Mandatory Reference Checking in the Banking Sector

讓壞蘋果不再滾動：銀行業強制性背景 查核計劃

The introduction of mandatory reference checking requirements aims to curb the ability of bank employees holding specified positions who have engaged in misconduct at one bank moving to another bank, known as “rolling bad apples”, without disclosing their past wrongdoing.

引入強制性背景查核要求旨在阻止某些擔任特定職位，而曾有失當行為的銀行僱員，能夠在沒有披露過往的失當行為的情況下，而轉職至另一家銀行，俗稱為「滾動的壞蘋果」現象。

After a year of preparation, the Hong Kong Monetary Authority (HKMA) launched Phase 1 of the Mandatory Reference Checking (MRC) Scheme on 2 May 2023 to tackle “rolling bad apples”. In short, the MRC Scheme establishes a framework requiring Authorised Institutions (AIs) to request and provide references about employees at various seniority levels and areas of responsibility. This article provides an overview of the MRC Scheme, explores potential legal issues the MRC Scheme may give rise to, and offers suggestions to AIs on navigating the new waters.

Background

In May 2020, the HKMA issued a consultation paper to address the “rolling bad apples” phenomenon in the banking sector. In its consultation conclusions paper on the MRC Scheme published on 3 May 2021, the HKMA stated that respondents to the consultation supported the implementation of the MRC Scheme with respect to employment in specified positions. On the practical side, the respondents were in favour of a phased implementation approach.

On 5 May 2022, the HKMA issued a circular on the MRC Scheme. It announced that the MRC Scheme will apply to all AIs and would be implemented by phases. Phase 1 will cover a narrower scope of personnel. After gathering experience and feedback about its implementation, the MRC Scheme will be expanded to Phase 2 to cover more personnel. Following a 12 month preparatory period, AIs were required to implement Phase 1 of the MRC Scheme by 2 May 2023.

MRC Scheme at a glance

The MRC Scheme requires AIs recruiting (Recruiting AI) for certain specified positions that fall within the scope of the MRC Scheme to approach the former and current AI employers of a prospective employee (Reference Providing AI) to request conduct-related information about the prospective employee.

A Reference Providing AI must report the following conduct information about a prospective employee to a Recruiting AI:

1. breach of legal or regulatory requirements;
2. incidents which cast doubt on an individual's honesty and integrity;
3. misconduct reports filed with the HKMA;
4. internal or external disciplinary actions arising from conduct matters; and
5. ongoing internal investigations.

經過一年的籌備，香港金融管理局（金管局）於2023年5月3日推行第一階段的強制性背景查核計劃（MRC計劃），以應對「滾動的壞蘋果」現象。概括而言，MRC計劃制定了一套框架，規定認可機構可索取及提供有關不同資歷級別和業務範圍的僱員的背景資料。本文簡略介紹該項計劃、探討該計劃可能涉及的法律事宜，並向認可機構提供有關建議，協助其理解該新規定。

背景

金管局於2020年5月發出諮詢文件，以應對銀行業「滾動的壞蘋果」現象。金管局於2021年5月3日發表的諮詢總結中表示，回應諮詢的人士均贊成對擔任特定職位的銀行僱員實施MRC計劃。就實際執行而言，金管局表示回應者支持分階段實施該計劃。

金管局於2022年5月5日發出有關MRC計劃的通告，公布該計劃將適用於所有認可機構，並會分階段實施。第一階段將會涵蓋較少部分的僱員，在取得第一階段實施的經驗和意見後，該計劃將擴展至第二階段，並擴大涵蓋範圍至更多僱員。經過12個月的準備期，認可機構須於2023年5月2日起實施第一階段計劃。

MRC計劃概覽

MRC計劃要求認可機構（招聘機構）在招聘該計劃下特定職位的僱員時，須與潛在僱員的前任和現任認可機構僱主（資料提供機構）聯繫，以索取與該潛在僱員行為有關的資料。

資料提供機構必須向招聘機構提供有關潛在僱員的以下行為資料：

1. 違反法律或監管規定；
2. 使人對其誠信產生疑問的事件；
3. 向金管局提交的失當行為報告；
4. 因行為問題引致的內部或外部紀律行動；及
5. 正在進行的內部調查。

招聘機構須使用標準表格提出索取有關資料的要求。資料提供機構在接獲要求後，須在一個月內回覆。如資料提供機構遇到確實困難，

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A Recruiting AI should request this information using a standard template. After receiving the request, the Reference Providing AI has one month to respond. If the Reference Providing AI encounters genuine difficulties and is unlikely to be able to meet the deadline, it should provide an interim reply to the Recruiting AI before the expiry of the one-month period. The interim reply should set out the reasons for the longer time required and an estimated timeframe for providing a response. The Recruiting AI is deemed to have discharged its obligations if it has not heard from the Reference Providing AI after one month or the period of time mutually agreed. Where the Recruiting AI receives negative information about a prospective employee, it should in general, on the ground of fairness, provide that prospective employee an opportunity to be heard in response to the negative information about him/her.

The HKMA emphasised that a Reference Providing AI should report any misconduct information that is deemed serious or material in nature, even where the Reference Providing AI did not terminate the prospective employee for misconduct. While a Recruiting AI retains the discretion in employment and remains responsible for its employment decisions, it should document the reasons for employing a prospective employee if it opts to employ him/her after receiving negative or inconclusive information from the Reference Providing AI.

Phase 1 of the MRC Scheme commenced on 2 May 2023. The HKMA will review the progress of Phase 1 by mid-2025, two years after its implementation. Another round of consultation

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金管局強調，即使資料提供機構沒有因潛在僱員的行為失當而終止其僱用，資料提供機構仍須就任何屬嚴重或重大的失當行為提供資料。”

而未能在一個月期限內提供資料，便應在期限屆滿前向招聘機構提供初步回覆，並註明需時較長的原因，以及預計作出回覆所需的時間。若在一個月後或在雙方協定的時間內，招聘機構仍未收到資料提供機構的回覆，招聘機構便應被視作已履行其在MRC計劃下的責任。招聘機構如收到有關潛在僱員的負面資料，為公平起見，一般應給予潛在僱員就負面資料作出回應的機會。

金管局強調，即使資料提供機構沒有因潛在僱員的行為失當而終止其僱用，資料提供機構仍須就任何屬嚴重或重大的失當行為提供資料。雖然招聘機構保留聘用僱員的酌情權，並仍需為其聘用決定負責，但如果招聘機構在收到資料提供機構提供的負面或不確定資料後仍決定聘用該潛在僱員，則應記錄聘用該僱員的原因。



will likely be conducted in conjunction with the Phase 1 review before the implementation of Phase 2. At this stage, there is no set date for the implementation of Phase 2.

Phase 1 applies to the following categories of individuals:

1. directors approved under section 71 of the Banking Ordinance (BO);
2. chief executives and alternate chief executives approved under section 71 of the BO;
3. managers notified to the HKMA under section 72B of the BO;
4. executive officers approved under section 71C of the BO;
5. responsible officers (ROs) approved by the Insurance Authority (IA) under section 64ZE of the Insurance Ordinance (IO); and
6. ROs approved by the Mandatory Provident Fund Schemes Authority (MPFA) under section 34W of the Mandatory Provident Fund Schemes Ordinance (MPFSO).

It is proposed that Phase 2 will expand the MRC Scheme to cover staff licenced or registered to carry out regulated activities under the Securities and Futures Ordinance (SFO), IO and MPFSO.

MRC 計劃第一階段由2023年5月2日起展開。金管局將於2025年年中，即第一階段計劃實施兩年後檢視進度，屆時可能同時展開另一輪諮詢，才實施第二階段。第二階段目前尚未有確定的實施時間。

第一階段涵蓋以下類別的人士：

1. 根據《銀行業條例》第71條獲核准的董事；
2. 根據《銀行業條例》第71條獲核准的行政總裁及候補行政總裁；
3. 根據《銀行業條例》第72B條通知金管局已成為經理的人士；
4. 根據《銀行業條例》第71C條獲核准的主管人員；
5. 根據《保險業條例》第64ZE條獲保險業監管局核准的負責人；及
6. 根據《強制性公積金計劃條例》第34W條獲強制性公積金計劃管理局核准的負責人員。

根據建議，MRC 計劃第二階段將擴展至《證券及期貨條例》、《保險業條例》及《強制性公積金計劃條例》下獲發牌或註冊從事受規管活動的員工。

Legal issues arising out of employment references

Providing references

Under Hong Kong common law, employers have a duty to take reasonable care to ensure the information a reference contains is true, accurate and fair. The author of a reference must take reasonable care to ensure that the reference is not misleading either by reason of what is left out of the reference, or by including facts which, although viewed discretely might be accurate, none the less either through nuance or innuendo generate a misleading picture when considered overall (*Bartholomew v London Borough of Hackney* [1998] EWCA Civ 1604). In the past, the court has found employers liable when they have failed to prepare references with reasonable care and, employees suffered damage as a result (see *Spring v Guardian Assurance* [1995] 2 AC 296). If a reference is to include allegation(s) against the employee that has not been investigated, the employer must make this clear (*Jackson v Liverpool City Council* [2011] EWCA Civ 1068).

Therefore, Reference Providing AIs must take reasonable care in ensuring that the information they provide under the MRC Scheme is true, accurate and fair, in order to avoid a potential claim being brought against them. Given a negative or inconclusive reference will likely reduce an employee's ability to secure a job, there may be heightened risk an affected individual will challenge the reference.

In the more recent case of *Hincks v Sense Network Ltd* [2018] EWHC 533 (QB) (Hincks) that concerns an employer giving a negative reference in light of an internal investigation against its former employee, an independent financial adviser, the England and Wales High Court summarised the common features of the employer's duties as follows:

1. to conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion, whether those facts and opinions emerge from earlier investigations or otherwise;
2. to take reasonable care to be satisfied that the facts set out in

僱員評介所牽涉的法律事宜 提供評介

根據香港普通法，僱主有責任採取合理的謹慎態度，確保其提供的資料真實、準確和公平。評介撰寫人必須採取合理的謹慎態度，以確保評介不會因遺漏任何內容而產生誤導，亦不會包含一些儘管分開看來可能準確，但整體而言會因細微差別或影射而引致誤導的事實 (*Bartholomew v London Borough of Hackney* [1998] EWCA Civ 1604)。以往法院曾因僱主未能以合理的謹慎態度準備評介導致僱員蒙受損失，而裁定僱主須負上責任 (*Spring v Guardian Assurance* [1995] 2 AC 296)。如評介包含對僱員未經調查的指控，則僱主須清楚說明 (*Jackson v Liverpool City Council* [2011] EWCA Civ 1068)。

因此，資料提供機構必須採取合理的謹慎態度，確保在MRC計劃下提供的資料真實、準確和公平，以免遭受索償。由於負面或不確定的評介有可能減低僱員成功求職的機會，因此可能會增加受影響人士對評介提出質疑的風險。

在較近期的一宗案件 *Hincks v Sense Network Ltd* [2018] EWHC 533 (QB) 中，涉案僱主因其前僱員（獨立財務顧問）曾接受內部調查，而給予該僱員負面的評介。英國高等法院總結僱主有以下責任：



the reference are accurate and true and that, where an opinion is expressed, there is a proper and legitimate basis for the opinion;

3. where an opinion is derived from an earlier investigation, to take reasonable care in considering and reviewing the underlying material so that the reference writer is able to understand the basis for the opinion and be satisfied that there is a proper and legitimate basis for the opinion;
4. to take reasonable care to ensure that the reference is fair in the sense of not being misleading either by reason of what is not included or by implication, nuance or innuendo.

Nevertheless, the England and Wales High Court held in *Hincks* that employers are not under a duty to examine the procedural fairness of the underlying investigation unless the relevant documents prompt such inquiry.

Therefore, Reference Providing AIs are reminded that while they need not to examine the procedural fairness of every internal investigation they provide information on, they should take reasonable care that the reference they give contain true and accurate facts, and where an opinion is provided, that opinion is provided with a proper and legitimate basis.

1. 須對事實及意見(尤其是負面意見)進行客觀和嚴格的評估,不論該等事實及意見是否來自早前的調查或其他方式;
2. 須採取合理的謹慎態度,以確保評介中所列出的事實準確及真實,而亦須確保在表達意見時,有適當及合法的基礎;
3. 若所表達的意見源於早前的調查,須採取合理的謹慎態度,考慮和審閱相關的調查資料,以便評介撰寫人理解意見的基礎,並確信該意見有適當及合法的基礎;
4. 須採取合理的謹慎態度,以確保所提供的評介公平,即不會因遺漏任何內容或因暗示、細微差別或影射而產生誤導。

不過,在 *Hincks* 一案中,英格蘭和威爾士高等法院裁定,除非相關文件促使僱主進行查證,否則僱主沒有責任審視早前的調查程序是否公平。

因此,資料提供機構應注意,雖然其不必在提供有關內部調查的資料時審視每項內部調查的程序是否公平,但他們應採取合理的審慎態度,確保評介中所提及的事實真實及準確,且所表達的意見有適當及合法的基礎。



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Secrecy

Reference Providing AIs may also need to consider their other duties and obligations when deciding the content of their references. Secrecy obligations in legislation such as the BO and SFO require persons assisting in certain statutory enquiries or investigations to preserve secrecy over such enquiries or investigations. Breaching the secrecy provisions can give rise to criminal liability. Thus, a Reference Providing AI should check that none of the conduct information they are obliged to provide about a prospective employee is subject to the statutory secrecy requirements and, if it is, to seek consent from the regulator concerned to the disclosure it intends to make in compliance with the terms of the MRC Scheme.

Data privacy

While the Privacy Commissioner for Personal Data acknowledges the need for the MRC Scheme, she has raised concerns and suggested AIs handle personal data with care when implementing the MRC Scheme. AIs should pay attention to, among others, the following areas.

Data Protection Principle (DPP) 1(3) requires data users to take all practicable steps to ensure that data subjects are informed as to the purpose their data will be used for, and to whom they may be transferred to. Thus, Reference Providing AIs should inform their employees, perhaps in a personal information

保密

資料提供機構在決定其評介內容時，須考慮其他義務和責任。《銀行業條例》、《證券及期貨條例》等法例中的保密責任要求為某些法定查訊或調查提供協助的人對該等法定查訊或調查保密，一旦違反保密條款，可引致刑事責任。因此，資料提供機構須檢視所須提供與潛在僱員行為有關的資料是否受法定保密規定所規管。如果受到規管，該等機構應就需按照 MRC 計劃要求披露有關內容，徵求相關監管機構的同意。

個人資料私隱

個人資料私隱專員認同 MRC 計劃的必要性，但她提出一些關注事項，並建議認可機構實施 MRC 計劃時須小心處理個人資料。認可機構須留意的事項，包括以下幾方面。

保障資料原則第 1(3) 條規定，資料使用者須採取所有切實可行的步驟，確保資料當事人獲告知其資料將會用於何種目的，以及資料可能轉移給甚麼人士。因此，資料提供機構應告知其僱員（例如透過個人資料收集聲明）會收集何種個人資料，以及如何使用該等資料，包括為遵從 MRC 計劃的規定而把資料轉移給招聘機構。



collection statement, what type of personal data would be collected and how would they be used, including the transfer of data to Recruiting AIs for compliance with the MRC Scheme.

Data accuracy is essential from the perspective of personal data privacy. Therefore, Reference Providing AIs should take all practicable steps to maintain the accuracy of the data about their former and current employees.

In line with the DPPs and Personal Data (Privacy) Ordinance, which provide data subjects a right to request correction of inaccurate personal data, both Recruiting

and Reference Providing AIs should implement measures and have policies and procedures in place to ensure that they can comply with a data correction request. In other words, they should allow the individual concerned to respond to a negative reference about him/her.

Both Recruiting and Reference Providing AIs should put in place adequate security measures to ensure that the relevant data is securely kept and transmitted.

Looking ahead

HKMA has stated that, although it did not introduce the MRC Scheme as a supervisory requirement, it attaches “great importance” to the MRC Scheme’s implementation. In particular, it considers that repeated failures of an AI to comply with the MRC Scheme may indicate “potential weaknesses” with its governance. The regulator stated that it would “monitor AIs’ observance of the MRC Scheme during its ongoing supervisory efforts and may initiate follow-up actions” as appropriate. Therefore, it is anticipated that AIs will receive enquiries from the HKMA in the coming months to check on compliance with the terms of the MRC Scheme. To prepare adequately for the HKMA’s focus on this scheme, AIs are encouraged to familiarise themselves with the relevant guidelines issued by the Hong Kong Association of Banks and DTC Association and seek legal advice where necessary. **BT**

從個人資料私隱的角度來看，資料的準確度十分重要。因此，資料提供機構應採取所有切實可行的步驟，確保前僱員及現職僱員的資料準確。

根據保障資料原則及《個人資料(私隱)條例》，資料當事人有權要求改正不準確的個人資料。因此，招聘機構和資料提供機構均須實施措施，並制定政策及程序，確保他們能夠依從改正資料的要求。換句話說，他們應容許相關人士對其負面資料作出回應。

招聘機構和資料提供機構均應實施足夠的保安措施，確保相關資料妥為保存，並安全傳送。

未來展望

金管局表示，雖然MRC計劃並不是監管要求，但該局卻「十分重視」該計劃的實施。其中，金管局認為認可機構若屢次未能遵從MRC計劃，則可能顯示其管治存在「潛在弱點」。金管局又稱，該局會透過日常監管工作中監察認可機構在遵從MRC計劃的情況，並可能採取跟進行動（視情況而定）。因此，在未來數月內，認可機構可能將接獲金管局查詢，檢視其有否遵從MRC計劃的要求。為了做好充分準備，以應對金管局對此計劃的關注，認可機構應熟悉香港銀行公會和存款公司公會發出的相關指引，並在有需要時尋求法律意見。 **BT**

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