

General Legal Advice and Guidance for University Staff

Guidelines for University staff on providing references for students

1 Introduction

Staff are frequently asked to provide references for students to enable them to gain employment or move on to further study. References are intended to provide an accurate and objective assessment of an individual. When providing a reference the referee accepts obligations to both the subject of the reference and the employer to whom they are providing the reference and must provide an accurate and fair reference. These guidelines provide advice on the content of references and also highlight some of the potential pitfalls that can arise in extreme cases. There are two principle aims of a reference:

- To **confirm facts**.
- To **provide opinions** as to the candidate's suitability.

The two should be clearly differentiated and referees should not confuse fact and opinion e.g. "on her performance to date, I would be surprised if X did not achieve a first class degree" is clearly an opinion; "she will get a first class degree" suggests that the issue is beyond doubt.

Faculties are advised to adopt an overall policy on the provision of references for students and whatever the approach adopted, it should be communicated to all relevant staff and students within the Faculty. The development of an agreed standard reference for each student may help to ensure that staff workloads are kept to a minimum. However, in some cases employers may request information via a standard proforma in which case it may not be appropriate to provide the reference in a standard format.

The student intranet has a brief section on Employment References. This informs students that the University has issued guidelines to staff on preparing references and reminds students that they need to obtain the permission of the member of staff they intend to name as a referee before they submit their application. It also reminds them to give their referee a copy of their CV or other similar information and to keep their referee up to date with the jobs or courses they have applied for.

2 Duty to provide a reference

It is implicit that if someone comes to the University and completes a course then the University will give a reference, even if only **an academic reference**. There is an implied term in the contract between University and student to the effect that the student will be treated fairly.

A claim for breach of contract is possible if a reference is refused or not provided within a reasonable time for most completed University courses (especially vocational courses) it is reasonable to expect a reference to enable the student to go

on to further study or gain employment. However, students should not be told that they can expect a satisfactory reference, only that a reference will be given. Equally it would not be reasonable to award a pass in a vocational course and then state in the reference that they are not fit to work.

3 Legal Context

Referees are under a legal obligation to use due skill and care when compiling references to ensure that they are based on accurate factual information. It is therefore important not to act unreasonably or carelessly in providing a reference. Since the University would be vicariously liable for references given by staff in the course of their employment, the University could consider taking action against a member of staff who knowingly provides a defamatory or malicious reference. Academic freedom does not mean that referees can say whatever they wish in references. There are several different bases upon which a legal claim could be made if a reference was false in a material way:

Defamation - a written or spoken statement which "tends to lower the reputation of the [individual] in the eyes of right thinking members of society".

Malicious falsehood - the making of a statement of fact which is untrue, which is known to be untrue or which is made recklessly and which is made with a view to damaging the individual.

Negligence - failing to discharge the duty to take due care in the framing of a reference, potentially actionable by the student, his/her employer, and in some cases the general public. Recent case law has established that, where there is negligence, a candidate does not have to prove actual loss of an appointment, but only that (s)he has lost a reasonable chance of employment and thereby sustained a loss. A former student at the University of Glamorgan accepted £25,000 in settlement of a damages claim for a negligent reference.

Contractual Claims - a breach of the University's implied obligation to provide a reference where there is a legitimate expectation that one will be provided and/or breach of the obligation to treat students fairly.

The **Data Protection Act 1998** applies to references (as below).

4 Data Protection

All personal data processed by the University must comply with the requirements of the Data Protection Act 1998 (DPA98). The DPA98 sets out 8 principles of good information handling practice which state that personal data must be:

- processed fairly and lawfully - this means that at least one of a number of provisions must be met and certain information must be provided to the data subject when the data is collected
- only processed for the purposes for which it was obtained
- adequate, relevant and not excessive
- accurate, up to date and necessary

- only kept as long as needed
- processed in accordance with data subject's rights
- surrounded by proper security
- not transferred outside the European Economic Area (EEA) unless an adequate level of protection for the rights and freedoms of the data subject is available.

A specific concern in terms of providing references is that staff should avoid unauthorised disclosure of information e.g. to someone who the student has not applied to for a job or course.

5 Responding to a request for a reference

5.1 General: The University has strict rules about the disclosure of personal information. It is not inconceivable that an unsolicited or false request for a reference could be made, for example to ascertain the whereabouts of an individual.

Students are advised that they should obtain permission from the member of staff who they intend to use as a referee before submitting applications. A Faculty may decide that only certain staff should provide references (e.g. course leaders or unit leaders). If this is the case students should be informed of this policy. In some cases it may not be practical to limit the staff who can provide references e.g. where the referee should have direct professional knowledge of a student having worked with them in a practical setting such as a placement.

If a student has asked you to be a referee and you receive a request, you can assume that this is a genuine request and you do not generally need to seek additional consent from the data subject. However, if you have any doubts about the legitimacy of the organisation or the request you should seek further evidence of consent.

If the reference request is **vague** (e.g. no details on the job) then contact should be made and more information sought.

5.2 Telephone and Verbal References: It is not good practice to provide references by telephone (or to follow-up written references by telephone) and this should not normally happen. Such references may be acceptable if the data subject has requested the referee to provide a reference that is needed at short notice.

Telephone references have the same effect legally as written ones but are more likely to be misinterpreted and it is more difficult to prove what was said. With incoming telephone calls it is also difficult to verify the legitimacy of the request and, as a minimum security measure it is recommended to ring the enquirer back. If there is no alternative but to provide a reference by telephone, steps should be taken to confirm the identity of the person requesting the reference e.g. checking the phone number via directory enquiries to ensure that it corresponds with the employers address. In this situation, you should state that the reference is given "without legal responsibility" and that you reserve the right not to answer certain questions. The reference must be followed up in writing immediately and it should be made clear to

the recipient that the written reference is the formal reference and not the telephone reference.

5.3 Requests by e-mail: It is not advisable to accept a request by e-mail as genuine (unless the request is provided as an attachment on headed note paper from a verifiable/legitimate e-mail address). Enquirers should be advised to submit their request in writing on headed note paper.

5.4 Unsolicited references: Staff should not disclose any information if asked to give an unsolicited reference (for a person who has not, to your knowledge, cited your name as a referee). Disclosure of data in the form of a reference should only take place either following confirmation of the employer's identity and the data subject's identity and application or on specific request by the data subject.

5.5 Refusing to give a reference: where a request is received but you are unwilling or unable to provide a reference, such a refusal should be communicated carefully, without, in effect, implying a negative reference and thus disclosing personal data.

5.6 References for criminal justice or civil court proceedings: there have been occasions when the University has been asked by a solicitor to provide a reference for one of their clients (who is also a student). The request may be for an academic reference in connection with personal injury proceedings (e.g. commenting on how an accident has affected the academic attendance or performance of a student) or a character reference for a student accused of criminal activity. Generally, the University is not obliged to provide a reference in such circumstances and will normally decline to be involved in providing witnesses for civil actions. Sometimes staff are willing to consider such a request, in which case they should restrict the contents of the reference to verifiable facts and:

- make clear whether they are providing the reference in a personal capacity or on behalf of the University
- assure themselves that they have appropriate consent from the data subject to provide the reference;
- for a character reference, ensure that they have sufficient knowledge of the student on which to provide an opinion.

6 Confidentiality

All references are given in confidence and should be marked "private and confidential - for the attention of the addressee/committee/panel only". Referees should state that the reference is given only for the benefit of the addressee. If staff intend for the references they provide to be confidential to both the subject of the reference and the recipient, this must be specified. However, there may be an obligation to disclose the contents of a reference under certain circumstances:

- In most cases where a copy is requested by the data subject under their rights set out in the Data Protection Act 1998 (see section 7 below);
- If required by a Court or enforcement order;
- If required in defending a claim for damages.

7 Right of access to references under the Data Protection Act 1998

Section 7 of the DPA98 specifically exempts "confidential references" given or to be given in confidence by the data controller from subject access. However, referees received by a data controller are open to subject access and may be seen by the data subject. So although the student may not be able to obtain a copy from Sheffield Hallam (since the University is providing the reference) they may be able to obtain a copy from the recipient.

Where information relating to the writer of the reference would be disclosed by providing a reference as part of a subject access request, the University Secretariat will decide whether to grant access to references that the University has received (including internal references which may also be open to subject access such as to upgrade from an MPhil to a PhD). It would be hard to justify withholding the reference if it directly affected a decision on a candidate's suitability for appointment. In any event, if a subject was to request access to a reference to pursue a court case challenging its impact on their career it would most likely be available under the legal proceedings exemption (Section 35).

Referees should note that they cannot rely on the reference remaining confidential and that it may be seen by the data subject. In any event, references should not contain any information which cannot be substantiated, and the requirement for accuracy applies regardless of who actually sees the reference. You should never put anything on paper that you would not be prepared to defend in Court.

8 Compiling References

A University reference for a student may contain input from more than one member of staff since the person writing the reference may have a limited picture of the student. Faculties are advised to develop a policy on the appropriate person to co-ordinate the preparation of references (normally the course leader) although in some cases it may only be appropriate for someone who has direct professional knowledge of the student to draft the reference e.g. in a placement environment,. The policy should be made clear to students and students should seek permission before naming a referee. If a student names an undesignated member of staff the request can be satisfied by the Faculty's designated referee if the policy is explained to the recipient of the reference and the student.

It should be noted if a reference is provided in a **personal capacity** and without the University's knowledge, rather than on behalf of the University, then this should be stated and **University letterhead must not be used**. Where the reference writer is using an employer's form then a University stamp should be used to ensure that it is treated as an 'official' rather than a personal response.

9 General Contents

9.1 Factual accuracy: The basis of a good reference is a factual account of an individual. Information in the reference should be capable of substantiation (preferably by written evidence) and if any element of descriptive analysis is required

it would be helpful to make a statement at the outset outlining the parameters within which the reference is given (for example, the writer's knowledge of the personal circumstances of the student). References which provide factual information are difficult to challenge.

A referee should not give information about a candidate unless sure of its accuracy, even if the information per se is harmless, as a discrepancy between the information given by a candidate for a job and that provided by the referee may have a negative effect on the interviewer's perception of the candidate.

If there is uncertainty about any details relating to an individual then the details must be checked with the Academic Registry, local records or the individual themselves. If the reference could be viewed as unfavourable or poor, it is a good idea to check the contents with a colleague who has knowledge of the individual. If the reference contains a negative statement it must be objectively fair and true. If there is likely to be disagreement over the contents of the reference, the individual should be informed and given the opportunity to use an alternative referee and/or to explain.

9.2 Referees opinion: If a opinion is included then reasons for that opinion should be given. Those reasons should be taken from the student's file and a contemporaneous note filed with the reference giving the evidence for any views expressed. Opinions should be based on an honest belief and should not be malicious or perverse. A referee should be qualified to give such opinions and should only give opinions within their professional competence. If you are asked to express an opinion on an issue about which you have limited knowledge e.g. honesty and integrity, you may have to say, for example, "I know of nothing that would lead me to questions X's honesty."

Avoid making statements that are outside your knowledge. For example, if an individual is applying for an unusual job, unconnected with the degree discipline or past experience and about which little is known, avoid stating that he/she is suitable for the job.

9.3 Assessing competency: If a student is assessed on a number of competencies, these can be referred to (and verified by marks sheets or placement reports) to illustrate strengths and weaknesses. For example, if someone lacks communication skills then it may be possible to say that based on their placement performance they displayed above average competence in team-work and/or subject knowledge and performed less well in communication skills, but still achieved the minimum required standard.

9.4 Future performance: If asked to comment on a student's likely future performance, base any statements as much as possible on fact, i.e. 'on the basis of past performance and projecting this to the final year I am optimistic that Joe Bloggs would be able to obtain'. If possible make it clear that this is just opinion, not fact. It is important not to confuse the two. Past performance is fact, comments about future performance are opinion. Language should not be ambiguous or coded.

9.5 Where the referee has limited knowledge of the student: Particular problems may arise in references for distance learning students where academic staff have

little or no personal knowledge of the student. In these cases, the best that can be provided is an academic transcript, accompanied by an explanation of why this is the case.

10 Specific Contents

As a basic principle, an employer should not be misled as to the history of an applicant if it is material to the future employment. However, what is or is not relevant to a particular application must be determined on an individual basis. If trivial, irrelevant or immaterial matters are mentioned then a subject is likely to complain.

10.1 Health information: Where reference forms request information relating to sensitive data e.g. sickness, mental health problems, staff should not supply such data unless this is explicitly requested (in writing) by the data subject. "I am not in a position to comment regarding X's health/sickness" would be a suitable response. If a reference is to include sensitive information then the permission of the subject should first be obtained, and this will be true on each separate occasion a reference is generated. In some areas, e.g. health students, there are requirements to report on sickness etc as part of the wider duty of care to the recipient and in such cases students should be informed that reporting on sickness absence is a routine part of references.

10.2 Criminal records: The University's standard policy on references for students is not to respond to queries about any possible criminal convictions, cautions or bindings-over. Such information is obtained by the University through a self-declaration process at the application stage and may be obtained through Disclosure and Barring Service (DBS) disclosures for students in Health & Social Care and Education. This constitutes sensitive personal data as defined by the Data Protection Act 1998 and cannot therefore be divulged without the explicit consent of the data subject. The University is also bound by the DBS Code of Practice and cannot by law pass on Disclosure information. Where a student is found to have a conviction, caution or bindings-over, a University panel assesses the nature, severity and time of the incident and, using professional guidelines, determines whether the individual is suitable to enter or remain on the course. The University expects that employers will conduct self-declaration checks and DBS checks themselves where appropriate.

10.3 Action under Disciplinary, Fitness to Practise or Academic Misconduct Regulations: Such actions by the University, against a student should not be mentioned unless you believe it to be directly relevant to the duty of care that you owe to the recipient of the reference (i.e. relevant to the job, course, etc. the student has applied for). If the job or course assumes a high level of responsibility, such as caring for vulnerable adults or children and/or a high level of personal integrity, then it may be appropriate to refer to the student's poor standing. Where a student has been disciplined and has been told that details of the 'conviction' will stay on his/her file for a certain number of months then the 'conviction' should not be referred to after this date. Disciplinary proceedings in which the allegations were dismissed should not be mentioned.

10.4 Care should be taken not to undermine or contradict the University's own awards. For example, it is not appropriate to say that someone is unsuitable to be a

nurse if he/she has just completed a nursing qualification. If the individual's character is important to the job then care is needed. For example describing a nursing student as "harsh and abrasive" led one University to seek legal advice following a complaint by the student. Likewise, it is likely to be unreasonable to refuse to provide a reference if the course has been completed successfully. It is permissible to assess the strengths/weaknesses of a candidate but if someone is wholly unsuitable for their chosen profession his/her future should be addressed through the assessment regulations/course requirements.

10.5 Attendance records: Care should be taken when referring to student attendance records. If attendance is a requirement of the course then this should be written into the course/assessment regulations and these should make it clear that poor attendance may be referred to in references. Registers should be used to verify attendance and to deal with problems as they arise, rather than at the reference stage. If, however, attendance is not mandatory (only whether the student passes or fails the course) it may not be legitimate to refer to attendance.

11 Format

The use and adaptation of a 'core' reference for students and development of a standard proforma may reduce the time taken for dealing with multiple requests. A standard proforma allows information to be checked easily for accuracy and updated. A section for summative comments is also helpful and could be checked with colleagues (and possibly the student). Standard headings could include time management, motivation, academic ability and "other" (special incidents/events). The latter places the onus on the referee to check the file and not rely on personal memory. It would also allow difficult matters, such as whether to refer to disciplinary action, to be considered at a senior level. In cases where an employer requests information via their own standard proforma (with pre-set questions) it may not be appropriate to provide the standard agreed reference.

12 Setting Limits

In general terms, the referee should always state the context in which the reference is given so that it will be clear if the referee has a limited acquaintance with the student/employee. If there is any particular concern as to lack of knowledge, a phrase such as "to the best of my knowledge" and "it is my true belief" may be advisable. It may be possible to limit potential legal liability if it is made clear to the subject of the reference that a reference will only be given if he/she accepts that there will be a disclaimer of liability to him/her and to the recipient of the reference. However it is not advisable to rely entirely on disclaimers, as they are likely only to be effective if fair and reasonable, and may only cover expressions of opinion and not purported statements of facts. There is no guarantee that a disclaimer will not be challenged in court, therefore due care must be exercised in preparing a reference. Referees are advised to include the following disclaimer in all references:

"It is standard practice of this University to provide references on the understanding that legal liability is not accepted."

13 Former Students

The University receives a significant number of requests in connection with applications for promotion several years into a past student's professional career. If the referee lacks recent knowledge of the applicant, this should be stated clearly at the beginning of the reference. In these cases references are more likely to be purely factual, although referees may wish to ask the candidate for an update on his/her activities since graduating.

14 Requests for a qualification check

Sometimes an enquirer simply wishes to confirm that an applicant or new employee has the Polytechnic or University qualification stated in their application form or certificate. The University subscribes to an online service to provide this information to enquirers, the Higher Education Degree Datacheck service available at <https://www.hedd.ac.uk/>. They can check and verify awards gained through Sheffield Hallam University, Sheffield Polytechnic or Sheffield City Polytechnic.

15 Timing

Requests for references should be responded to with the minimum of delay as unreasonable delays will reflect badly on the University's reputation and may jeopardise the candidate's chances of employment. If a delay is inevitable then it is good practice to acknowledge the request and indicate when the request will be dealt with.

16 Retention of references

Staff are advised to keep copies of any references provided, for a minimum period of 1 year (in case of possible litigation from unsuccessful applicants). Student references should be stored on the student file in the Faculty office. Faculties may retain references for longer if they deem this necessary for drafting future references.

17 Challenges to a reference you have provided

If a member of staff is challenged over a reference they have given, they must never admit liability, as this may invalidate the University's insurance policy. The matter should be referred to Legal Services.

18 Related Guidance

Further guidance on data protection issues may be found on our website:
<https://portal.shu.ac.uk/departments/srd/other/Sec/IG/Pages/Data-Protection.aspx>

Advice on providing preferences for staff may be obtained from the Human Resources Department and they will be issuing written guidance in due course.

Enquiries to: Legal Services Officer, ext 3854
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