

# Response to the Review of the Disclosure and Barring Regime

## Introduction

Unlock is a national independent advocacy charity that supports, speaks up and campaigns for people facing stigma, prejudice and discrimination because of their criminal record. Our mission is to advocate for people with criminal records to be able to move on positively in their lives. We support people with criminal records to navigate their way through challenging times, research and raise awareness of the systemic issues that people are facing, and campaign for changes to legislation, policies and practices of government, employers and others.

Our website provides vital information and guidance for people with criminal records, and we also have a helpline run by dedicated staff and volunteers, which deals with specific queries. People can [contact the helpline](#) in various ways, including via email, WhatsApp or our free phone line.

This document sets out Unlock's response to the [Independent Review of the Disclosure and Barring Regime](#). We provided an [initial response](#) to the findings of the review on its publication in April 2023. This response provides more detailed comments and covers some elements of the review which we welcome as positive as well as elements of the review where we have certain concerns about the recommendations made, either in their entirety or in part. For reference, the recommendations of the review are provided in Annex 1.

## Background

The Independent Review of the Disclosure and Barring Regime ("the review") was announced in February 2022, and this response was published a year later. We welcome the detailed and thorough approach taken by the review, and the way it responded to evidence presented by those with expertise and experience in the field, such as Unlock. It is positive that there has been consideration of the relevant recommendations by the Independent Inquiry into Child Sexual Abuse (IICSA) and that the review have supported proposals that will provide an overall benefit.

We are disappointed, though, that the review did not address the fundamental complexity of the criminal records system, and how this impacts on the effectiveness of the Disclosure and Barring Service (DBS). For example, the issue of complexity in respect of what level checks employers can carry out was not addressed, even though ineligible checks create a huge problem, not just for people with criminal records applying for jobs but for employers as well. In addition, we are concerned about a general trend to increase the number of Enhanced checks being carried out, without addressing the current problem of less serious offences, as well as historic convictions that are no longer relevant showing up on such checks. For example, adult cautions can still show up if they are for certain offences, even though they are only used when it is deemed that

the incident is not serious enough to be taken to court. This is a particular problem because we know that some employers use Enhanced checks as an all or nothing check rather than responding to any information on a case-by-case basis. This means people are sometimes automatically excluded if anything shows up on a check, regardless of the different factors such as offence type, seriousness, length of sentence and time since caution or conviction. We are worried that where this review proposes to expand the number of roles that are eligible for an Enhanced check to be carried out, more people will be subject to these checks and possibly excluded from roles regardless of the relevancy of their criminal record. It is therefore important that for any change which increases the use of Enhanced checks, clear guidance is provided to make sure these checks are only carried out when necessary, and that the information provided on the checks is considered in context, rather than blanket decisions being made to exclude anyone who has something showing up on the check.

## Issues

### Regulated activity

There are two recommendations made in this chapter of the review. The first proposes that the definition of regulated activity be altered to remove the exception for activity which is supervised. This aligns with a recommendation of the Independent Investigation into Child Sexual Abuse (“IICSA”) that there be greater use of the barred list to “help ensure” children’s safety. Subject to its effective use, we would welcome use of the barred list for work with children and vulnerable adults. We do, however, think it is important to ensure that the barring list system is effective, both in terms of giving employers the appropriate information if there are risk factors they need to be aware of and being fair so that people are not included or retained on either list where it is not necessary.

The second recommendation here is that “consideration be given to amending the definition of regulated activity with the aim of making it more easily understood by those who must apply it”. We would welcome greater clarity. The current level of complexity is a contributing factor in the system sometimes being applied incorrectly and ineligible checks (those being conducted at a higher level than is allowed) being carried out, often to the detriment of those with criminal records. There are also disadvantages for those carrying out the ineligible checks as it can mean they receive information they have no right to access and therefore should not take into account when making recruitment decisions. As such, making the definition of regulated activity “more easily understood” would help to address these issues of ineligible checks.

Similarly, we are concerned that a broadening of the definition of regulated activity risks an increase in the number of checks done; effective and clear guidance would be needed to ensure that this is not the case. As noted above, Enhanced checks can carry a greater risk of people being inappropriately excluded from jobs where employers use the information disclosed incorrectly as an all or nothing check. Adequate resources would need to be provided to ensure that not only does appropriate guidance exist but also to ensure that the DBS is able to provide advice to support best practice. We would also like better enforcement to be in place for when ineligible checks are carried out.

## The self-employed

Chapter 3 of the review proposes that self-employed individuals, paid or unpaid, seeking to work with children or vulnerable adults are made eligible to apply for their own Enhanced with barring DBS checks. Currently, this is not possible. As noted in the review, the Home Office and Ministry of Justice are conducting work to explore the feasibility of this. So long as feasibility issues (including determining how the system would be regulated) were resolved, we would welcome such a process.

There are wider benefits of allowing individuals to conduct their own Enhanced with barring list checks if this were expanded beyond those who are self-employed. This would allow people to know what will show up on the check and, therefore, whether they will be excluded from certain jobs before they decide whether to apply or even to train or qualify for a role. It also means that when asked to self-disclose details of their cautions or convictions, they will know what to include. This is particularly important to help people understand what has been filtered, so they do not over-disclose. We know that over-disclosure is a real problem, both in terms of sharing unnecessary information as well as the fact that some employers assess self-disclosure against criminal record checks as a form of honesty testing, without realising that individuals may not know what will show up on an elevated DBS check.

## Local councillors

The review recommends (Recommendation 5) that local councillors “being considered for appointment to any committee involved in decisions on the provisions of children’s services or services for vulnerable adults” should be subject to mandatory Enhanced checks. The rationale in the review for this appears to be that this is the case in some instances and, therefore, it should be made consistently so; this is despite the fact that the review did not have the capacity to gather information from all councils on this issue. This is a recommendation about which we have a number of reservations.

Firstly, while consistency of practice across organisations can be a positive thing, that is not true where that consistency promotes bad practice. We do not believe the review clearly demonstrates what good practice is, which is important before encouraging something to be done more consistently.

Secondly, we are concerned about the strength of the rationale for extending this check eligibility. It is not clear that serving on council committees with decision making powers over these services meets the definition of regulated activity. If it did, then we would assume safeguarding considerations would also be triggered, thus allowing for use of the barring list. This is not proposed by the review, so we are not clear what the rationale is for this recommendation. We would argue that there should be a clear need for a particular role to engage an elevated check, linked to the particulars of the role accounting for a need to access more information about someone’s criminal record.

Thirdly, we have concerns about the potential for unintended ramifications if this recommendation was taken forward. We are concerned that requiring Enhanced DBS checks to be carried out before someone can serve on some committees would run the risk of some committees not being representative of the elected councillors given some might then end up

being excluded following checks. A secondary form of exclusion could be the impact of the chilling effect on those considering standing for election. If certain council committee roles were limited by DBS checks, some people might be reticent to stand for election for fear of later criminal records disclosure if they sought roles on those committees. This would also have the impact of highlighting spent convictions which have not been filtered (so disclosing convictions that people would not normally have to share in almost all situations). If people were elected to sit on the council, then more elevated checks were carried out in respect of certain committees, individuals might have to “out” themselves as having a conviction either to explain why they are not offering to sit on such a committee or why they were barred from doing so. Concern about exclusion, perceived or otherwise, can lead to practical exclusion. We also have concerns about how any information revealed as part of an Enhanced check may be handled. For example, who would be deemed as the ‘employer’ to interpret this information and decide who could sit on these committees and how would such information be held if an individual later lost their seat on the council or role on the committee?

Finally, existing concerns about the consistency of practice across police forces with regards to information disclosed on Enhanced checks is pertinent here. This inconsistency leads to individuals being unable to be certain about what information will be disclosed on an Enhanced check, as there is currently no way for someone to see their own Enhanced check. This may also cause geographic inconsistencies regarding the ability of elected representatives to serve on certain committees (albeit information held on individuals is not only held by the police force in area in which they currently live, there is likely to be a disproportionate impact here). This inconsistency would undermine the consistency of practice this section of the review seeks to promote.

Overall, we do not find this recommendation persuasive. We are concerned that such checks would hamper the ability of councils to form committees effectively and in a representative manner. We are also concerned that such checks could have a chilling effect on who may choose to stand for election to councils and that police force disclosure inconsistencies would act to entrench these issues.

### The Security Industry Authority

Recommendations 6 and 7 concern the Security Industry Authority and the licenses they grant, specifically concerning door supervisors (6) and close protection licenses (7). In both cases, the recommendation is that such licenses carry a mandatory requirement for an Enhanced with barring lists DBS check. We have concerns around the proposed mandatory nature of such checks. Given the activity undertaken by those with such licenses will not necessarily fall under the definition of regulated activity, we would question whether the checks need to be mandatory. A more nuanced approach is needed, in which an elevated check is only required if the role being undertaken meets the definition of regulated activity. While we appreciate that there may be certain roles carried out by individuals holding either licence that involve duties of care to vulnerable adults or children, there are equally many examples of roles undertaken by license holders that do not do so. The holding of a particular license does not define whether activity is regulated, so we believe this recommendation is too sweeping.

With reference to recommendations made elsewhere in the review concerning regulated activity and how it is defined (1 and 2), the recommendations here could be changed to reflect a more nuanced, role-based approach. Were the definition of regulated activity made clearer and easier to understand, a more role-based approach to when Enhanced with barring checks are needed, as suggested above, would be more appropriate and workable.

## Name change

Recommendation 8 proposes that “the Home Office and the DBS continue the work of assessing what, if any, further steps can be taken to mitigate the risk of individuals circumventing the DBS identification validation process, including the consideration of mandating the provision of a birth certificate as one of the documents establishing identity.” While not itself explicitly proposing that birth certificates are made mandatory for getting a DBS certificate, we are concerned about their inclusion in the review of this as something to be explored.

As noted in the review, there is not conclusive evidence that name changes are providing a significant risk of individuals avoiding appropriate disclosure of criminal records information. Despite accepting that there already are, and being “satisfied with”, measures in place to mitigate the risk posed by individuals changing their name, the review nonetheless suggests that this is a problem in need of a solution. Furthermore, the specific recommendation that further work be done to explore the effectiveness of mandating the provision of a birth certificate seems to be based upon “public contributors to this debate”. As such, we are concerned that these proposals run the risk of unhelpfully engaging in ‘culture wars’ issues regarding name changes that contribute to an ‘othering’ or ‘demonising’ of groups such as the transgender community.

Besides the lack of concrete evidence to require such a change, we are concerned about the exclusionary nature the requirement of a birth certificate would represent. Not only would this directly impact transgender people who have not had their birth certificate updated – potentially leaving them unable to apply for a DBS certificate under their current name – other vulnerable groups would also be adversely affected (such as refugees who may not hold the paperwork such a process would require). These exclusionary scenarios are in addition to the fact such a requirement would potentially contribute to an increased chance of delays in the process, with the knock-on effect that could have on people’s employment.

## The Update Service

Where the review engages with the workings of the Update Service, we have some reservations about whether priorities are correct in terms of identifying ways in which the service could be improved. As we noted in relation to the Update Service in our initial response, “it is unclear how the current process is working, and why new applications are not being sought in the vast majority of cases where a change is identified”. Without this understanding, recommendations of change may be missing crucial issues.

There is ongoing work to improve the Update Service to make it more accessible – at present it is not accessible to all depending on the status of individuals’ criminal records – and to ensure that it reflects changes made in the Police, Crime, Sentencing and Courts (PCSC) Act 2022. Completing

these improvements should be a priority for the DBS before any further alterations are considered.

The recommendation included in this section of the review, Recommendation 9, proposes that work be undertaken to determine whether the Update Service could provide organisations with notifications of an individual's change in status. Besides the issues of priorities outlined above, we also have concerns about the practicality of such a system. We would be concerned about the risk to individuals' data were they to change jobs if push notifications about change of status were provided directly to employers. Similarly, we would query whether such a system could cope with those who have multiple jobs. We would also be concerned about how consent would be dealt with, as individuals may give consent at one point, but may seek to rescind this if they knew that certain new information was to be shared with the employer. In these cases, a clear system for the giving and withdrawing of consent to share with employers would be crucial. A potentially sensible system to account for this could send a push notification to an individual, with it then only forwarded on to an employer if the individual has not taken the opportunity to rescind consent. An employer would then be notified that the individual has left the Update Service, allowing them to query this directly with the individual if they wished. Further to these practical considerations, we would question whether this is something for which there is clear demand and whether it meets a specific need.

## Conclusion

In conclusion, there are elements of this review that we are encouraged by. Primary among these is the proposal that the definition of regulated activity be made less complex and easier to understand. This is one example of a wider complexity in the criminal records system that needs to be addressed in order to ensure that the DBS system works effectively for both individuals and organisations. We would, however, have preferred the review to have gone further on recommending the level of clarity in defining regulated activity, for example in relation to the way in which "supervised" activity be defined, and being clear on ways in which the DBS could be resourced to more effectively support best practice in this area. Similarly, we support the recommendation concerning self-employed people applying for their own Enhanced with barring list checks, as long as feasibility checks are carried out.

Our concerns with this review centre on where it engages with specific issues. The evidence presented to advocate for the changes regarding local councillors is not hugely persuasive, while the recommendations concerning the Security Industry Authority lack nuance. The inclusion of a recommendation to explore the potential requirement of a birth certificate as identification in applying for a DBS check seems flawed and risks engaging with "culture wars" issues. We worry that the section on the Update Service fails to illustrate a demand for what is recommended or to place this issue within a full understanding of the current state of the Update Service.

So while there are positive elements of this review, we have concerns about some of the specifics with which it engages.

## Annex 1: recommendations of the review

1. I recommend that the definition of regulated activity relating to children be amended to remove the exemption for supervised activity.
2. I recommend that consideration be given to amending the definition of regulated activity with the aim of making it more easily understood by those who must apply it.
3. I recommend that the legislation governing enhanced checks with barred lists checks is amended so that aid workers, who are nationals or residents here, whose contracts of employment are made here and whose work would bring them into contact with aid beneficiaries overseas are eligible.
4. I recommend that self-employed individuals, paid and unpaid, seeking to work with children or vulnerable adults are rendered eligible to apply for an enhanced DBS certificate with the relevant barred list(s) check.
5. I recommend that an enhanced criminal record check is made mandatory for all councillors in Unitary and Upper Tier Authorities who are being considered for appointment to any committee involved in decisions on the provisions of children's services or services for vulnerable adults. I accept that this would require legislation and therefore some inevitable delay, so I further recommend that these authorities are encouraged to adopt this procedure as best practice pending legislation.
6. I recommend that enhanced DBS checks together with barred lists checks are made mandatory for applicants for the grant or renewal of a door supervisor's licence.
7. I recommend that enhanced DBS checks together with children's barred list checks are made mandatory for applicants for the grant or renewal of a close protection licence.
8. I recommend that the Home Office and the DBS continue the work of assessing what, if any, further steps can be taken to mitigate the risk of individuals circumventing the DBS identification validation process including the consideration of mandating the provision of a birth certificate as one of the documents establishing identity.
9. I recommend that the DBS carries out the work necessary to establish the feasibility and cost of redesigning the Update service to enable employers, who have been given permission to carry out status checks, to receive notification of any change to the status of the certificate.