



**UNLOCK**  
The National Association  
of Reformed Offenders

# Briefing Paper on the Criminal Records Bureau

UNLOCKing Employment

February 2010



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UNLOCK is an independent charity and membership organisation, set up to achieve equality for people with previous convictions. We believe in a society in which reformed offenders are able to fulfil their positive potential through equal opportunities, rights and responsibilities.

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# Briefing Paper on the Criminal Records Bureau

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## 1. Statement of purpose

This paper has been written for submission to the Criminal Records Bureau after UNLOCK's examination of cumulative issues brought to our attention by individual members concerning difficulties they have encountered when seeking employment. It sets out to provide a constructive critique of the Criminal Records Bureau (CRB) process, to identify matters we feel need addressing, and to make recommendations to resolve them. It will be further circulated to our membership and other parties for further thoughts, comments and suggestions.

The paper is not intended as a final statement on UNLOCK's policy position regarding the CRB in its entirety.

## 2. Background

In 1974 the Gardiner Committee Report, *Living it Down*, recognised that continually forcing individuals to disclose their offences was counter-productive as they were unable to secure employment or insurance. The Report led to the enactment of the *Rehabilitation of Offenders Act* (ROA) later the same year, a law which aimed to "restore the offender to a position in society no less favourable than that of one who has not offended." Despite the good intentions behind the Act it is largely ineffective and people with past convictions continue to face great difficulties when trying to get a job. The implementation of, and later additions to, the 1975 Exceptions Order, which was introduced to limit the ROA to protect the public and in particular children and vulnerable adults, has further exacerbated difficulties for those seeking in employment in an increasing number of professions.

Since 1974 sentences have inflated and the ROA's rehabilitation periods have been criticised for being disproportionately long. The Act was subject to a review in 2002<sup>1</sup> which recommended many changes including the significant reduction of disclosure periods. In November 2009 Lord Dholakia introduced the Rehabilitation of Offenders (Amendment) Bill<sup>2</sup>, seeking to introduce the disclosure periods earlier proposed by the Government proposed in its response to the 2002 report. UNLOCK published a briefing paper for the second reading of the Bill<sup>3</sup>, which, in addition to the Bill itself, discusses further issues raised by UNLOCK members regarding the aim and purpose of the original ROA and suggests ways in which it can operate more effectively. The briefing paper should be read in conjunction with this submission.

Legislation for the CRB is contained in the Police Act 1997. It allows employers to obtain an official record of an employee's, or prospective employee's criminal record. For jobs covered by the ROA this would be by means of a basic disclosure (only disclosing unspent convictions). For roles and professions contained in the 1975 Exceptions Order this would be by means of a standard disclosure (both unspent and spent convictions) or enhanced disclosure (same as a standard but with various additional information).

However, **employers in England & Wales have never been provided with a service to obtain basic criminal records disclosures**. This means that many employers are forced to choose between either conducting no checks, or else conducting illegal checks at the standard or enhanced level. Unsurprisingly, **UNLOCK members indicate the use of illegal CRB checks is widespread**, resulting in

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<sup>1</sup> Home Office (2002) *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act, 1974*

<sup>2</sup> At the time of writing, this Bill is currently at the Report stage in the House of Lords

<sup>3</sup> *UNLOCKing Employment: Briefing Paper for the 2<sup>nd</sup> Reading of the Rehabilitation of Offenders (Amendment) Bill 2009*. [www.unlock.org.uk](http://www.unlock.org.uk).

employers being informed of spent convictions and preventing them obtaining employment as a result. Voluntary codes of conduct have proved ineffectual.

The principle behind standard and enhanced CRB checks, in that some offences that are 'spent' under the ROA but still capable of being regarded as relevant for a specific job role, is not challenged here. However, because of the way that the CRB process has developed, an increasing number of employers are finding out about criminal records which are wholly irrelevant to a particular job role and as a result, refuse to take on, or dismiss, people who pose no risk to anyone. Often, despite employers ostensibly seeking to appoint the best person for the job, they often err on the side of caution and make decisions based on perceived risk and media fear rather than genuine risk.

Many employers routinely refuse to take on people who have *any* information revealed on a CRB check, including unproven allegations. Job roles which require CRB checks tend to be ones which are more highly skilled, professional and better paid. Given that over 8 million people are on the Government Offenders Index, and one third of men by the age of 30 have a criminal record, the potential result is that millions of people are unnecessarily suffering either unemployment or underemployment.

Given the significant number of people in society with a criminal record, if people with convictions were seeking a full range of employment, one would expect the number of CRB checks revealing information to be around 20%. Currently, only 7.5% of CRB checks reveal information, suggesting that ongoing discrimination has forced people with previous convictions to seek lower-status positions. In this way, the CRB has further reinforced discrimination and social exclusion which already exist towards reformed offenders.

### 3. The current CRB process

For a position to be exempt from the ROA, and therefore potentially subject to a CRB check, it must fall within the 1975 Exceptions Order. The growing list of exceptions contained in the Order is maintained and amended by the Ministry of Justice (MoJ).

#### 3.1 Roles/positions eligible for CRB checks

As a result of legislative change, most notably through constant additions to the ROA Exceptions Order 1975 and the introduction of the Safeguarding Vulnerable Groups Act 2006 (SVGA), there has been a **significant growth in the use of standard and enhanced CRB checks**.

In 2008/09, 3.9 million CRB checks were carried out. However, the number of positions that require registration with the new Independent Safeguarding Authority (ISA) under the SVGA is estimated at 9 million. These positions are now eligible for enhanced CRB checks, resulting in **an ever decreasing number of people benefitting from the ROA**.

In general, standard and enhanced disclosures cover positions that involve regularly caring for, training, supervising or being solely in charge of, children or vulnerable adults. These are not the only occupations listed however, and disclosures can be required in order to hold Gaming Act or Gambling Act certificates or licences; for occupations connected with lotteries; placing children with foster parents; being a school governor; jobs that allow access to data concerning children and vulnerable adults; being a medical practitioner, dentist, ophthalmologist or pharmacist and so on. It is mostly, but certainly not exclusively, those who work with children or vulnerable adults who have to undergo enhanced disclosures.

Increasingly, entire industries and professions are becoming exempt from the ROA, without any in-depth look at whether all roles within those areas justify being exempt. As a result, a vast number of positions are increasingly becoming 'no-go' areas for people with convictions. The ROA is being constantly undermined by more and more positions being added to the Exceptions Order, seemingly on the basis of supposed good regulatory practice rather than on any evidence that there is a need for an employer to be aware of spent convictions.

Furthermore, there appears to be no standard benchmark that a role or position is required to meet to justify being added to the Exceptions Order.

**Action needed:** The MoJ to undertake a full review of current exceptions. Exceptions to be granted on the basis of an individual job role, not the whole employer, industry or profession, giving consideration to the role of basic disclosures and the ISA in employment vetting.

**Action needed:** The MoJ to review the current application and decision-making process for deciding whether a position should be exempted from the ROA.

**Action needed:** The MoJ to make the above process publicly available.

### 3.2 Clarity on what jobs are eligible for CRB checks

- **The MoJ has never made an official consolidated version of the 1975 Exceptions Order** describing in comprehensible language what positions are exempt. The result is that it can be very difficult to ascertain precisely what roles or positions are exempt from the ROA. Although the CRB maintains on its website a list of broad categories of jobs that may be subject to CRB checks, it is not clear, from an employee's perspective, whether a particular position can require a CRB check. For example, there is very little detail on what level of 'contact' is required when working with children or vulnerable groups, despite this being a fundamental part of the relevant legislation as to whether a CRB check can legally be undertaken.
- There is a duplication of roles defined as 'regulated activity' under the SVGA (Category 1 and 2 of the Disclosure Access Category Codes (DACC's)), and those mentioned elsewhere in the 1975 Exceptions Order.

**Action needed:** The MoJ to produce an official consolidated version of the 1975 Exceptions Order, removing any duplications.

- There is currently a misconception amongst many employers and volunteer organisations that a CRB check can be undertaken for any role where *they* deem it necessary. For example:
  - Very often, the reason given by employers for undertaking a CRB check is that a position involves access to children and/or vulnerable adults. The fact that an employee may come into contact at some point with children/vulnerable adults does not in itself make the position eligible for a check;
  - In many cases, employers believe 'contact with the public' constitutes 'contact with the vulnerable'. If this were the case, almost every occupation could require a CRB check given that most people come into contact with the public at some point during their employment. Such a wide interpretation of 'contact' was not Parliament's intention when legislating;
  - For a CRB check to be legal, the role to which it is being applied for must satisfy the level of contact defined in legislation.
- In CRB guidance, the difference between what constitutes eligibility for a standard check and what constitutes eligibility for an enhanced check is not clear.

**Action needed:** The MoJ/CRB to provide clear guidance, based on an official consolidated list, on what positions and roles are eligible for checks and at what level they can be carried out, with particular focus on the level of contact needed to warrant a CRB check.

- The CRB Customer Service helpline appears unable to provide any detailed guidance to individuals querying the legality of a CRB check. For example, there is currently no process in place which allows an individual to give detailed information of a particular role and receive an official response as to whether a CRB check is allowed.

**Action needed:** The CRB to have a formal mechanism in place which enables an individual to give detailed information of a particular role and receive an official response as to whether a CRB check is allowed.

### 3.3 The legal framework designed to prevent illegal CRB checks

#### 3.3.1 The Police Act 1997

**s. 122 – the legislative basis for the CRB to prevent an illegal CRB check from being undertaken**

(3) The Secretary of State may refuse to issue a certificate under section 113 or 115 if he believes that the registered person who countersigned the application—

- (a) Has failed to comply with the code of practice under this section, or
- (b) Counter-signed at the request of a body which, or individual who, has failed to comply with the code of practice.

**s. 123 – the criminal sanction applicable to those who undertake an illegal CRB check**

(2) A person commits an offence if he knowingly makes a false statement for the purpose of obtaining, or enabling another person to obtain, a certificate under this Part.

(3) A person who is guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

#### 3.3.2 CRB Code of Practice

The CRB Code of Practice was initially introduced as part of the legislation which brought the CRB into being. It is intended to ensure that information released will be used fairly. It applies to all Registered Bodies and Umbrella bodies, as well as their clients. Of particular importance is the intention of the Code to “ensure that organisations do not breach the spirit and requirements of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 by submitting ineligible disclosure applications”. The Code goes on to state that “registered bodies must use all reasonable endeavours to ensure that they only submit disclosure applications in accordance with the disclosure eligibility criteria for relevant positions or employment”. However, all the code cites in terms of remedial action is the ability of the CRB to suspend or cancel an organisation’s registration where the organisation fails to meet the conditions of Registration or the terms of the Code of Practice.

The Code also places a requirement on employers to have a written policy on the recruitment of ex-offenders. Often this is simply the ‘sample policy’ which is provided on the CRB website, if one is used at all. Although this complies with the letter of the Code, it doesn’t comply with the spirit. A written policy is an opportunity for an employer to set out clearly their likely attitude to receiving an application from somebody with a past criminal conviction. For example, it may state that they would exclude people who have been convicted of serious violent or sexual offences. Although this may be disappointing for individuals who are within this definition, at least the expectations of individuals would be set from the outset, rather than having standard ‘off-the-shelf’ policy statements which are essentially meaningless.

**Action needed:** The CRB to establish a process by which individuals can report employers who in practice do not follow their written statement, backed by potential sanctions against the employer.

#### 3.3.3 Human Rights Act 1998

The disclosure of spent convictions for positions outside the Exceptions Order could breach Article 8 of the Human Rights Act 1998; the right to respect for private life.

### 3.4 Mechanisms to prevent illegal CRB checks

Despite the above legal framework, there has been an **unprecedented growth of illegal CRB checks**.

As part of the CRB application process, the role of the Registered Body (RB) is to ensure that an application meets the relevant criteria for the level of certificate as defined in the Police Act 1997. The RB must countersign that the application is for an exempted purpose as per the 1975 Exceptions Order, signing a mandatory declaration statement before the submission of each application form which states:

*'I certify that this application is for the purpose of asking an exempted question under the terms of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and made in accordance with all relevant legislation. I confirm that the requisite documentation and information has been supplied and checked in accordance with CRB guidance. I declare that the information I have provided in support of the application is complete and true and understand that to knowingly make a false statement for this purpose is a criminal offence'.*

Notwithstanding this declaration, there is evidence to suggest that many employers:

- Carry out CRB checks on posts that are not exempt from the ROA and therefore un-entitled to such information.
- Run enhanced disclosures on posts which are only eligible for standard disclosures.
- Ignore the CRB Code of Practice, which is designed to ensure that people with past convictions are treated fairly.<sup>4</sup>

In the *IRS Employment Review*,<sup>5</sup> research showed that 11% of CRB checks were for posts that were not exempt from the ROA. Given the all too common response by employers to criminal conviction information, **people are being refused employment based on an illegal check**. This seems to be occurring because, despite the criminal sanctions included in the Police Act 1997 for those who undertake an illegal check,<sup>6</sup> the CRB process is not fit for purpose in ensuring that applications which are made are legally allowed. Reasons for this include:

#### Issues with current mechanisms

- Evidence from UNLOCK members suggests that whole businesses are undergoing rolling programmes of CRB checks with little recourse to the relevance of such checks to specific job roles. **The CRB stated to UNLOCK that it is not an enforcement body.<sup>7</sup> It is apparently powerless to stop illegal checks.** The CRB further stated that in law, it is the responsibility of the employer/RB to decide whether a position is eligible for a CRB check. UNLOCK believes that the CRB has a duty to ensure that a process is in place to ensure compliance with the relevant legislation.
- On the CRB application form, only details about the organisations name and the position applied for are required. This makes it difficult for a RB/CRB to understand an employer's reasons for believing they are eligible for a check.

<sup>4</sup> Nacro (2006), *Getting Disclosures Right*, London: Nacro

<sup>5</sup> Suff, R. (2005), 'Checking out the activities of the Criminal Records Bureau', *IRS Employment Review* 483, pp. 42-48

<sup>6</sup> A person making a false declaration would be committing a criminal offence under s. 123(2) of the Police Act 1997.

<sup>7</sup> Telephone conversation with Head of Customer Service Delivery, 02/12/2009

- The DACC's (which identify under what section an application for CRB check is being made) are not a mandatory part of a CRB application form. This makes it impossible for the RB/CRB to ensure that checks are legal as they are unable to ascertain under what section an employer feels they are able to carry out a check.

**Action needed:** Employers/RB's must be legally required to state clearly in job descriptions and on job application forms what element of the job makes it eligible for a CRB check.

**Action needed:** The CRB to place a mandatory requirement on an employer/RB to clearly state on a CRB application under what exception they are entitled to undertake a CRB check and why. For example, making DACC's a mandatory part of the CRB form, and including a mandatory section describing the role and/or level of contact which justifies a CRB check at that level.

- People with past convictions are in a vulnerable position when trying to question the ability of an employer to undertake a CRB check on a job that they are applying for, have applied for, or hold, through fear of raising the suspicions of the employer.
- CRB Customer Services advise that if an individual feels that they have been asked to obtain a disclosure for a role which is not covered by the Exceptions Order, the CRB should be advised immediately of the organisations name and address. It has been suggested to UNLOCK by the CRB that it will investigate any breach of its Code of Practice, which may result in the organisation's RB status being withdrawn. However, it fails to offer a remedy to someone who is at the time of enquiry being asked by an employer to undertake a CRB check. Although they can de-register the RB, this does not stop a *prima facie* illegal CRB check being carried out.

Often the CRB refers queries of this nature to Nacro. Whilst Nacro is able to provide general advice to individuals, it is unable to take any direct action as an organisation to prevent an illegal check. It is demonstrably inappropriate for the CRB to abrogate responsibility in this regard by referring individuals to a third-party who cannot offer an effective solution to an individual's immediate problem. .

**Action needed:** The CRB to put in place a system whereby an individual or employer is able to establish whether a CRB check can be undertaken for a specific role.

**Action needed:** The CRB to put in place a system whereby an individual can query the actions of an employer/RB who attempts to, or does, carry out an illegal CRB check. The CRB to act to prevent the illegal check from taking place where it hasn't already, or be proactive in taking action under s. 123(1) of the Police Act where it has.

**Action needed:** The CRB to support the publication of guidance for people with past convictions, outlining the CRB process, the positions that are eligible for CRB checks, and how individuals can address issues such as employers undertaking illegal CRB checks.

- Despite organisations registered with the CRB being subject to regular monitoring from the CRB Customer Service assurance team, since the introduction of the Conditions of Registration in 2006 **only one registered body has been suspended for submitting an**

**ineligible application**; this registration has since been reinstated.<sup>8</sup> Furthermore, only one case has been brought under section 123 of the Police Act. This section of the Act is split into two parts, with one part making it a criminal offence to undertake an illegal check (s. 123(1)). Unfortunately, it is not known if the 2008 case was brought under s. 123(1), as centrally held data does not separately identify under which part of section 123 court proceedings took place.

Through further discussions with the CRB, it appears that **no registered body has ever been prosecuted for undertaking an illegal CRB check.**

- When acting as an Umbrella Body, a RB has a commercial interest in undertaking as many checks as possible, given that a fee can be charged for this service, the level of which is determined by the RB. Operating as an Umbrella Body can be a lucrative business.

**Action needed:** Improved guidance to RB's as to what positions are eligible for CRB checks, including what level of contact is necessary and the potential criminal penalties for undertaking illegal checks.

**Action needed:** Stronger CRB screening processes to prevent illegal checks.

**Action needed:** The CRB to take legal action against employers/RB's who undertake illegal checks

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<sup>8</sup> CRB Freedom of Information response, 2<sup>nd</sup> April 2009

## 4. The CRB check – what information is disclosed?

### 4.1 Cautions and convictions

Both standard and enhanced CRB checks currently disclose **all cautions and convictions** held on the Police National Computer (PNC), under the definition of ‘relevant matter’ in the Police Act 1997. Prior to October 2009, a ‘step down’ procedure was in operation which, though it didn’t delete information from the PNC, meant that after a period of time (much longer than that of the ROA ‘rehabilitation’ periods), conviction information was ‘stepped down’ and wasn’t disclosed for a standard CRB check and wasn’t automatically disclosed for an enhanced check. Although not perfect, this process nevertheless recognised that, after a certain period of time, a spent conviction may not be relevant for employment purposes. In October 2009, a Court of Appeal ruling meant that all cautions, convictions, reprimands and final warnings could be maintained on the PNC until an individual reaches 100 years of age. The Association of Chief Police Officers (ACPO) immediately suspended the step-down process. UNLOCK has submitted a series of recommendations to the *Independent Review of Policy on the Retention and Disclosure of records held on the Police National Computer (PNC)*, which announced in July 2009 by the Home Secretary in response to the above Court of Appeal case.

The result of conviction information being disclosed is that often employers do not feel able to take even the most hypothetical of risks because they believe that, if things were to go wrong, there could be consequences for them. No amount of argument around assessing and managing risk seems to be able to persuade them otherwise. To some extent, in today’s climate, such a risk-averse attitude is increasing. We need to therefore look at the process of disclosure. The recommendation that UNLOCK made to the above review discusses this area in detail.

There could, for example, be a process in place which allows spent convictions to be considered by an independent body. This kind of model is to some extent operated by the Security Industry Authority (SIA). It provides licences to individuals, including people with past convictions, when they are considered suitable to work in the security industry. The SIA has published clear guidance as to whom it will and will not provide a licence. Companies are willing to take on those who hold a license as they have been independently ‘checked’.

**Action needed:** The CRB to develop a sophisticated model via the Police Act 1997 to better define a ‘relevant matter’ so as to determine what information is relevant/should be disclosed for specific roles currently entitled to undertake a standard or enhanced CRB check. This would ensure that full information is available where the nature of an activity or post applied for calls for a high level of vetting. However, for positions where an exemption is required because of a specific risk, only relevant information would be disclosed e.g. only spent financial convictions for financial-related positions.

At present, all convictions are disclosed in standard and enhanced CRB checks. There is currently no process that an individual can undertake to prove that they are fully ‘rehabilitated’. Although the ROA does this to a degree, the Act doesn’t apply to those positions excepted from it. There needs to be a system which allows an individual to not have to disclose spent convictions when applying for roles which are exempt from the ROA in circumstances where they can prove that their convictions are no longer relevant. This could operate by way of introducing a Criminal Records Tribunal, which would allow for an individual to prove their ‘rehabilitated’ status.

**Action needed:** The MoJ to implement a Criminal Records Tribunal, administered by members of the judiciary, where people could have the opportunity to achieve rehabilitated status for the purposes of position exempt from the ROA.

#### 4.2 Non-conviction information

One principle difference between a standard and enhanced check is that an enhanced disclosure can contain 'soft intelligence' held on the PNC.

When allegations are made against an individual, the criminal justice system has a number of checks and balances in place, including the CPS and the court system, to ensure a judicial decision is reached in determining innocence or guilt. The reason why so many allegations appear on the PNC is because they cannot be substantiated and would be likely to be thrown out of court. There is currently an absence of any rigorous checks when disclosing 'soft information' for the purposes of employment vetting. This ultimately leads to an employer becoming judge and jury.

Given that any individual undertaking 'regulated activity' under the SVGA will also be under a legal requirement to become registered with the ISA, which itself will be made aware of any 'soft intelligence' on the PNC, there appears to be no situation where there is a need for an employer to be made aware of 'soft information'. It is logical that the ISA, not the employer, is best placed to attach relevance, if any, to such information. As a result, where a position is subject to ISA registration, only a standard check should be undertaken. There appears to be no situation where information not available through standard disclosure might be relevant to the employment of someone who has been cleared by the ISA. Liberty has put forward some very strong arguments in this regard in a briefing paper that they published for the Policing and Crime Bill 2009.

**Action needed:** Where a position is subject to ISA registration, only a standard disclosure should be undertaken by the employer.

## 5. Basic disclosures

Basic disclosures were introduced in section 112 of the Police Act 1997. They show all convictions held at a national level that are not spent under the ROA. Any employer can ask about unspent convictions, and hence Scotland introduced basic disclosures in July 2002 as a mechanism for an employer to obtain an official record of somebody's unspent criminal convictions. However, a basic disclosure service has yet to be introduced in England and Wales. They were not introduced in 2002 because of teething problems at the then newly-formed Criminal Records Bureau. A Home Office consultation on the problems resulted in their introduction being delayed until the CRB was operating effectively. In its Corporate Plan 2009-10, the CRB made a commitment to research how it can implement a basic disclosure service and to this end has begun work on design requirements for the operational model and will be testing this further with its stakeholders and potential customers over the next 12 months.

### 5.1 Arguments for the introduction of basic disclosures

- For the purposes of employment and insurance, individuals need to know the status of their criminal conviction, i.e. whether it is spent or unspent. The only official way that this can be ascertained is by way of a basic disclosure.
- As employers in England and Wales do not have access to basic disclosures through the CRB, they often seek to verify the criminal records of job applicants by asking them to apply to the police for copies of their criminal records under the Data Protection Act 1998 (DPA), known as an "enforced subject access" request which will reveal the applicant's entire criminal record, including spent and unspent convictions, as well as unproven allegations. Although such checks were made illegal under s.56 of the DPA, this section is only due to be implemented once basic disclosures are available. As a result, the Information Commissioner has published guidance advising employers to avoid requesting subject access records and for them to use Disclosure Scotland instead.
- Due to a perceived inability to obtain an official record of an individual's unspent convictions from the CRB, many employers undertake illegal CRB checks as a means of obtaining an official disclosure.
- 1,298,946 people in England and Wales were subject to basic disclosure checks by Disclosure Scotland between 2003 and 2008. This is an average of 4,163 a week, or 595 a day. The number of checks has more than quadrupled in six years, from 77,504 in 2003 to 443,413 in 2008. This is an average of 1,214 a day. They increased by 38% last year, from 320,815 in 2007. The Government itself uses basic disclosures from Disclosure Scotland for the pre-employment screening of civil servants, members of the armed forces, temporary staff and government contractors. For example, the Ministry of Justice (MoJ) uses Disclosure Scotland for carrying out basic checks after implementing the requirement for Baseline Personnel Security Standard (BPSS), which came into effect in April 2007 for those who are not subject to a Criminal Record Bureau standard or enhanced security checks. Between 1<sup>st</sup> October 2008 and the 19<sup>th</sup> October 2009, 505 checks were made by the MoJ.

## 5.2 Arguments against the introduction of basic disclosures

- The introduction of basic disclosures under current ROA provisions would serve to further marginalise people with convictions when seeking employment. The 'rehabilitation' periods set out in the ROA are disproportionately long; it takes 5 years for a fine to become spent and 10 years for a 7 month suspended prison sentence to become spent. A sentence of over 30 months' imprisonment never becomes spent.
- Basic disclosures would become a matter of routine for employers who may have previously never required disclosure of criminal convictions, and thereby excluding a large number of individuals with unspent criminal convictions who have previously not had to declare them.
- Basic disclosures are already available from Disclosure Scotland. Some employers, such as British Airways and Virgin, routinely use them.

**Action needed:** Basic disclosures should only be introduced in conjunction with wider reform of legislation surrounding disclosure of criminal records, most notably the reduction of 'rehabilitation' periods as those proposed by the Rehabilitation of Offenders (Amendment) Bill 2009.

**Action needed:** A basic disclosure should be capable of being backdated to a particular date so as to ascertain an individual's unspent convictions on a given date to assist in employment and insurance disputes.

## **6. Summary of action needed**

### **The current CRB process**

#### **Roles/positions eligible for CRB checks**

1. The MoJ to undertake a full review of current exceptions. Exceptions to be granted on the basis of an individual job role, not the whole employer, industry or profession, giving consideration to the role of basic disclosures and the ISA in employment vetting.
2. The MoJ to review the current application and decision-making process for deciding whether a position should be excepted from the ROA.
3. The MoJ to make the above process publicly available.

#### **Clarity on what jobs are eligible for CRB checks**

4. The MoJ to produce an official consolidated version of the 1975 Exceptions Order, removing any duplications.
5. The MoJ/CRB to provide clear guidance, based on an official consolidated list, on what positions and roles are eligible for checks and at what level they can be carried out, with particular focus on the level of contact needed to warrant a CRB check.
6. The CRB to have a formal mechanism in place which enables an individual to give detailed information of a particular role and receive an official response as to whether a CRB check is allowed.
7. Basic disclosures should be introduced in conjunction with wider reform of legislation surrounding disclosure of criminal records, most notably the reduction of 'rehabilitation' periods as those proposed by the Rehabilitation of Offenders (Amendment) Bill 2009.

#### **The legal framework designed to prevent illegal CRB checks**

8. The CRB to establish a process by which individuals can report employers who in practice do not follow their written statement, backed by potential sanctions against the employer.

#### **Mechanisms to prevent illegal CRB checks**

9. The CRB to put in place a system whereby an individual or employer is able to establish whether a CRB check can be undertaken for a specific role.
10. The CRB to put in place a system whereby an individual can query the actions of an employer/RB who attempts to, or does, carry out an illegal CRB check. The CRB to act to prevent the illegal check from taking place where it hasn't already, or be proactive in taking action under s. 123(1) of the Police Act where it has.
11. The CRB to support the publication of guidance for people with past convictions, outlining the CRB process, the positions that are eligible for CRB checks, and how individuals can address issues such as employers undertaking illegal CRB checks.

12. Employers/RB's must be legally required to state clearly in job descriptions and on job application forms what element of the job makes it eligible for a CRB check.
13. The CRB to place a mandatory requirement on an employer/RB to clearly state on a CRB application under what exception they are entitled to undertake a CRB check and why. For example, making DACC's a mandatory part of the CRB form, and including a mandatory section describing the role and/or level of contact which justifies a CRB check at that level.
14. Improved guidance to RB's as to what positions are eligible for CRB checks, including what level of contact is necessary and the potential criminal penalties for undertaking illegal checks.
15. Stronger CRB screening processes to prevent illegal checks.
16. The CRB to take legal action against employers/RB's who undertake illegal checks.

## **The CRB check – what information is disclosed?**

### **Cautions and convictions**

17. The CRB to develop a sophisticated model via the Police Act 1997 to better define a 'relevant matter' so as to determine what information is relevant/should be disclosed for specific roles currently entitled to undertake a standard or enhanced CRB check. This would ensure that full information is available where the nature of an activity or post applied for calls for a high level of vetting. However, for positions where an exemption is required because of a specific risk, only relevant information would be disclosed e.g. only spent financial convictions for financial-related positions.
18. The MoJ to implement a Criminal Records Tribunal, administered by members of the judiciary, where people could have the opportunity to achieve rehabilitated status for the purposes of position exempt from the ROA.

### **Non-conviction information**

19. Where a position is subject to ISA registration, only a standard disclosure should be undertaken by the employer.

## **Basic disclosures**

20. Basic disclosures should only be introduced in conjunction with wider reform of legislation surrounding disclosure of criminal records, most notably the reduction of 'rehabilitation' periods as those proposed by the Rehabilitation of Offenders (Amendment) Bill 2009.
21. A basic disclosure should be capable of being backdated to a particular date so as to ascertain an individual's unspent convictions on a given date to assist in employment and insurance disputes.