**Disclosure and Barring Factsheet**

**Introduction**

**This factsheet is about the regulations for the disclosure of information about people who work for, care for and provide services to vulnerable people, including children and the process for barring people who pose a risk to vulnerable people working with them. Between 2008 and 2010 there were a number of delays and reviews in the implementation of what was then called the “Vetting and Barring scheme”. However, there is now a new regulatory regime in England, Wales and Northern Ireland, and it’s important that UNISON branch reps and affected members are aware of these arrangements.**

**The coalition agreement, signed in 2010, included a commitment to review the existing vetting and barring scheme and criminal records regime and to reduce their scale to “common sense levels”.**

This factsheet gives the details of the disclosure and barring regime following the Protection of Freedoms Bill, which received royal assent in May 2012. The factsheet also offers advice to UNISON negotiators on issues which may arise.

**Employers’ Legal Duties**

Under the Disclosure and Barring regime employers have the following duties:

*A duty to ask for an enhanced check* **–** Employers must ask individuals who engaging in regulated activities to apply for an enhanced Criminal Records Bureau (CRB) check including a check on the appropriate barred list check (for children, adults or both).

*A duty to bar* **-** An employer who knowingly allows a barred person to work in regulated activity is breaking the law.

*A duty to inform DBS* **-** An employer who has dismissed someone from regulated activity because they harmed or posed a risk to vulnerable groups is legally required to inform the DBS. Guidance on when to refer can be found [here](http://www.isa.homeoffice.gov.uk/pdf/Factsheet%201%20Employers%20when%20to%20refer.pdf).

For many posts employers are *entitled* but not required to do an enhanced check.

Organisations need to be able to explain to individuals why the organisation has decided to ask for a check for that particular role.

**What is “Regulated Activity”?**

All individuals involved in “regulated activity” require an enhanced CRB check. The enhanced CRB check includes information on whether an individual is on a barred list. Since 10th September 2012 the definition of a regulated activity has changed to reduce the number of people covered. The old definition would have covered around 9 million people. The new definition reduces this to approximately 5 million people. There are separate definitions of regulated activity for those working with children and those working with adults.

Activity relating to children is regulated if it involves:

1. Unsupervised activities: teaching, training, instruction, care for or supervision of children, or providing advice/guidance on well-being, or driving a vehicle only for children
2. Work at a limited range of establishments with opportunity for contact: for example, schools, children’s homes, childcare premises. (This does not include work by supervised volunteers)
3. In relation to 1 and 2, only if done regularly.

And, if unsupervised:

1. “Relevant personal care” - for example washing or dressing; or health care by or supervised by a professional
2. Registered childminding; and foster-carers.

Regulated activity relating to adults no longer uses the term “vulnerable”. The definition focuses on the activities, the person is undertaking. Activity relating to staff working with adults is regulated if it involves:

1. Providing health care: Any health care professional providing health care to an adult, including those doing so under supervision.
2. Providing personal care, such as physical assistance with eating or drinking, going to the toilet.
3. Anyone who prompts and then supervises an adult who, because of their age, illness or disability, cannot make the decision to eat or drink, go to the toilet, wash etc.
4. Providing social work: The provision by a social worker of social work which is required in connection with any health care or social services
5. Assistance with cash, bills and/or shopping
6. Assistance in the conduct of a person’s own affairs, for example by virtue of an enduring power of attorney.
7. Transporting an adult who, because of their age, illness or disability to or from their place of residence and a place where they receive care. This does not include family and friends or taxi drivers.

In general terms, regulated activity still excludes family arrangements, and personal, non-commercial arrangements. Care and support workers – often known as personal assistants – who are employed directly by service users receiving direct payments are also excluded from the scheme.

There are no checks for anyone under 16 years old. Also, supervised individuals are not in regulated activity so long as the level of supervision is judged by the employer to provide reasonable assurance for the protection of the children concerned.

**The definition of supervision**

Whether or not someone is supervised plays an important role in deciding whether or not an activity is regulated or not, particularly regarding those working with children. In general terms, supervision exists for those working with children when:

* a person who is in regulated activity is supervising
* the supervision is regular and day to day
* the supervision must be “reasonable in all the circumstances to ensure the protection of children”

The statutory guidance goes on to say: “That gives local managers the flexibility to determine what is reasonable for their circumstances. The precise nature and level of supervision varies from case to case.”

Statutory guidance from the Department for Education on what constitutes supervision can be found here:

<http://media.education.gov.uk/assets/files/pdf/s/supervision%20guidance%20revised%20sos%20sept%202012.pdf>

**Which jobs does the Disclosure & Barring Scheme cover?**

Regulated activity covers ***all*** people who work on a regular basis in schools and nurseries. It also covers social workers, children’s centre workers and librarians and museum staff who deliver/ lead school visits. It covers **all** healthcare professionals and those delivering healthcare to children and vulnerable adults. This includes (but isn’t limited to) doctors, nurses, healthcare assistants, dentists, midwives, paramedics, speech and language therapists, osteopaths, psychologists and chiropractors. It also includes anyone providing personal care to an adult.

There is no exhaustive list of roles covered, but further guidance in relation to healthcare can be found here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/156253/Regulated-Activity-Adults-Dec-2012.pdf.pdf>

For guidance on educational roles see here: <http://media.education.gov.uk/assets/files/pdf/r/regulated%20activity%20children%20full%20information%20ewni%20final%202012-06-01.pdf>

The kind of roles which are no longer regulated activity following the 2012 changes are:

* giving legal advice
* treatment/therapy - unless it meets the new definition of health care which narrows the definition to “Health care which must be directed or supervised by a health care professional”
* volunteers supervised at a reasonable level whose role is carried out in a
* specified establishment.
* activity by a person contracted (or volunteering) to provide occasional or

temporary services which are not teaching, training or supervision of children.

Employers may still choose to apply criminal records checks for these roles but they cannot subject them to barring checks.

## Types of criminal records check

There are 3 types of check. Checks can only be made for roles which are exempt from the 1974 Rehabilitation of Offenders Act (ROA) – this is because they include checks on spent as well as unspent convictions. You can see the list here: <http://www.legislation.gov.uk/uksi/1975/1023/contents/made>

Enhanced checks can only be carried out on roles also covered by Part V of the Police Act 1997 – see here: http://www.legislation.gov.uk/uksi/1975/1023/contents/made

It is the responsibility of the employer running the check to provide the employee with more information about the level of check required. The table below explains the differences between the checks:

| **Type of check and cost** | **What it will check for** | **Positions eligible** |
| --- | --- | --- |
| Standard - £26 | Spent and unspent convictions, cautions, reprimands, final warnings | Must be included in the ROA Exceptions Order 1975 |
| Enhanced - £44 | As above - plus any additional information held locally by police forces that’s reasonably considered relevant to the post applied for | Must be included in the ROA Exceptions Order 1975 **and** Police Act 1997 |
| Enhanced with list checks - £44 | As above - plus a check of the appropriate DBS barred lists | Those meeting regulated activity definition |

Checks for volunteers are free of charge.

Under the new system criminal records certificates will be issued to the worker involved and not to the employer or umbrella body submitting the application. However the employer/umbrella body can request a copy.

**New filtering system**

New arrangements came into effect on 29 May 2013, which mean that certain old, and minor cautions and convictions will no longer be disclosed in a criminal record certificate. This follows the judgement made by the Court of Appeal on 29 January 2013, which stated that the disclosure of *all* convictions and cautions in a criminal record certificate breached Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life. The new arrangements are intended to provide individuals to move on from youthful misdemeanours. However the government is still planning to appeal the decision.

The new filtering system means In relation to *convictions* committed by an adult, information will **not** be disclosed (and does not have to be declared) where all four conditions outlined below are met:

• eleven years have elapsed since the date of the conviction; (or 5 ½ years for convictions received under the age of 18) and

• it is the person’s only offence

* it is not listed as one of the specified offences which must always be disclosed;

• it did not result in a custodial sentence; and

*Cautions* issued to an adult will not be disclosed where:

• six years have elapsed since the date of the caution being issued; (or two years for convictions received under the age of 18) and

• where the caution does not appear on the specified list of offences.

For more information see: <https://www.gov.uk/government/news/disclosure-and-barring-service-filtering>

Police forces will continue to use their powers to share information which they reasonably believe to be relevant and which, in their opinion, should be disclosed within the criminal record certificate.

**Online Update Service for Disclosure and Barring**

The Disclosure and Barring Service (DBS) has introduced a new ‘Update Service’ which was launched on June 17th 2013. This service enables employees to reuse their checks and help their employers to deliver a quicker and cheaper recruitment and employment process.

The Update Service is a subscription based and costs employees £13.00 a year (despite the Home Office originally promising the cost would be no more that £10), but the service is free to volunteers. The £13.00 charge is in addition to the fee for the check itself. Joining the online updating service is optional, although some employers may make it a condition of employment.

You can register for the service here: <https://www.gov.uk/dbs-update-service>

Using the service, employees can give permission to their employer to check for the most up to date status of their Disclosure and Barring Service Certificate. According to the DBS: “Where an online check reveals a change of status since the certificate was first issued the employer can request a new DBS check and ask the applicant to the show it to them, in order to be able to see the new updated information.”

**The referral and barring process**

**When an employer believes a member of their staff has “caused harm or poses a future risk of harm to vulnerable groups, including children” they have a responsibility to refer this information to the Disclosure and Barring Service.** This may evolve from a disciplinary process but not always.

**You can see more about this process here:** <http://www.homeoffice.gov.uk/agencies-public-bodies/dbs/services/dbs-referrals/>

After the DBS receives a referral it will be processed through a five-stage decision making process

**Stage one:** Initial case assessment which considers if there is relevant evidence

**Stage two:** Information gathering and assessment. The DBS has no investigatory powers so they rely upon the information provided by other organisations. The type of information provided by the employer might be minutes of disciplinary hearings, witness statements, dismissal/suspension letter, details of any police involvement. When this is gathered and assessed, the DBS will decide if the relevant conduct is proven “on the balance of probabilities” or whether risk of harm has been established.

**Stage three:** The DBS will use a “structured judgement process”, which is a risk assessment tool to determine if there is a future risk of harm to children or adults. If a risk of harm to children or vulnerable adults is identified and barring is deemed to be an appropriate response the DBS will then be ‘minded to bar’ the person from regulated activity. The case then progresses to stage four. Otherwise the case is closed.

**Stage four:** The person is advised in writing that the DBS has reached a ‘minded to bar’ view and invitesthem to make representations as to why they should not be barred. A copy of all of the information received by the DBS is sent to the person. The person then has eight weeks in which to provide representations to the DBS. Arrangements can be made to hear oral representations.

**Stage five:** The person is notified in writing of the final decision and, where the decision is to bar the person, they are notified of their rights to seek an appeal/review. If barred, it is illegal for the person to seek, offer or to engage in regulated activity with a vulnerable group they are barred from.

A decision can be appealed, but only under certain conditions. A barred person has the right to seek an appeal only on the grounds of an ‘error of fact’ or an ‘error of law’. Appeals are dealt with by the Administrative Appeals Chamber of the Upper Tribunal, or the Care Tribunal in Northern Ireland.

**Automatic Barring**

If someone has been cautioned or convicted for a 'relevant offence' they will be automatically barred. There are two types of ‘relevant offence’. They define whether you are able to make representations to the DBS before being barred or not.

Automatic barring without representations offences (e.g. sexual assault) results in the person being placed in a barred list(s) by the DBS irrespective of whether they work in regulated activity. There is no right to appeal in these cases.

If you are convicted of **some ‘relevant offences’** you have the right to make representations to the DBS to argue that you should not be barred from regulated activity.

 A list of ‘relevant offences’ that result in barring with or without representation can be found here:

 <http://www.homeoffice.gov.uk/publications/agencies-public-bodies/dbs/dbs-referrals-guidance/dbs-factsheet-5?view=Binary>

**What to do if you are referred to the Disclosure and Barring Service**

If you have been referred to the DBS and they have contacted you stating that they are “minded to bar” you, you should take steps to access the support and guidance from UNISON. You should:

1. Contact your branch immediately, explain what has happened and ask them to contact their regional officer. Keep all relevant documents together ready for UNISON to review
2. The regional officer will then open a case on your behalf and arrange to discuss your case with you.
3. The appropriate regional officer will be able to support you through the process of making your representation and, if required, through the appeals process.

**Confidential procedure for transgender workers**

There is a particular procedure for people who have changed gender which protects their confidentiality with employers while enabling the necessary checks against previous names. For England and Wales, contact the Sensitive Casework Manager at the Disclosure and Barring Service - sensitive@dbs.gsi.gov.uk or phone the dedicated line for transgender applicants 0151 676 1452. For Scotland, phone the Disclosure Scotland helpline on 0870 609 6006 and ask to speak to the Operations Manager in confidence.

In Northern Ireland, phone the Access Northern Ireland helpline on 02890 259100/email accessni@ani.x.gsi.gov.uk in confidence or see the Access NI transgender policy at [www.dojni.gov.uk](http://www.dojni.gov.uk)

**The CRB Dispute Process**

An individual can apply in writing to an Independent Monitor to request a review of whether information released as approved information, is relevant and ought to be included on the CRB certificate and therefore declared to a prospective employer.

Parties other than the CRB check applicant can dispute the accuracy of the information on a certificate

The police are restricted from supplying information to employers that is not shared with the individual, this ensures that its seen by the person first who can then challenge information if inaccurate or inappropriate.

**Convictions and cautions for consensual gay sex**

After years of campaigning, it is now possible for men with a criminal record for consensual sexual activity which is now lawful to have their offence ‘disregarded’. Once the Home Secretary gives notice that a particular person’s conviction, caution, warning or reprimand has been disregarded, that person will be treated in all circumstances as though the offence had never occurred. They need not disclose it for any purpose. This is not a blanket pardon for all consensual same sex activity predating the decriminalisation homosexuality and the equalisation of the age of consent. Individuals must apply to the Home Office.

Please see the links below for more information on this process: <http://www.homeoffice.gov.uk/publications/crime/decriminalised-sexual-offences/guidance-application?view=Binary>

And here: <http://www.stonewall.org.uk/at_home/hate_crime_domestic_violence_and_criminal_law/8064.asp>

**Bargaining Advice**

UNISON reps should seek to negotiate a barring and disclosure agreement at local level. Reps should seek to include the following in any agreement:-

* the employer pays for the enhanced check (including checking the barred list) for all employees engaged in regulated activities. Employing the right person with the right skills is a normal part of any recruitment process
* The employer pays the £13.00 annual subscription for the ‘Update Service’ for staff that are required to use it. Particularly if the employer makes it a condition of employment to join the on-line updating they should pay the fee. This represents a benefit to the employer in terms of time and administration saved.
* The payment should be made through reimbursement to the employee as the so that the subscription remains portable with the individual. UNISON should argue that for the employer to fulfil safeguarding responsibilities online updating is the best way but can only be reliably achieved if they pay.
* The employer has responsibility for identifying employees under its care who are engaged in regulated or controlled activities
* Employers should have a list of regulated activity posts for which the enhanced check is required.
* the employer is responsible for informing all appropriate employees of the disclosure and barring arrangements put in place by the employer. However you may wish to agree with them at a local level regarding how this information is communicated.
* The employer must guarantee confidentiality on information provided by employees arising from the disclosure and barring process
* Employees should be able to continue working whilst awaiting a response from the Disclosure and Barring Service (DBS)
* A procedure for the treatment of staff, such as redeployment, who are on the barred list but are awaiting an appeal
* Employees have the right to be represented at meetings with the employer to discuss disclosure and barring issues.
* If an issue arises during the CRB/barring list checking process and an appeal is unsuccessful employees should, where possible, be transferred to a non-regulated post
* Pay, grade and allowances should be equivalent to previous position where possible.
* If the transfer is to a position of a lower pay & grade then the employees pay and grade must be protected

**Organising around disclosure and barring**

Some UNISON members may not be aware of the introduction of the disclosure and barring system. UNISON reps should keep them informed and organise members around the issues which arise from the scheme.

This presents an opportunity for involving members in the working of their branch. This can be done by sending newsletters, producing posters for notice boards or holding meetings to spread the word. You might consider surveying members to see what they think of should be a negotiating priority in any agreement. Above all members should be kept informed about how negotiations are going.

By developing projects like this you can encourage more members into becoming involved in the union, possibly to be stewards or branch officers. Equally, non-members in the same work place will see how active and important the UNISON branch is, and may consider joining.

**Devolved Nations**

There are some differences in the way disclosure and barring operates in Northern Ireland compared to England and Wales. More information about these differences can be found here <http://www.dhsspsni.gov.uk/changes-to-barring.pdf>

Disclosure and barring is a fully devolved matter in Scotland. In Scotland a different “Protecting Vulnerable Groups” (PVG) scheme operates. While the PVG scheme is separate to the arrangements operated in the rest of the UK, a person placed on the PVG barred list by Disclosure Scotland is also barred from regulated activity in England and Wales. Information about the PVG scheme in Scotland is at: [www.disclosurescotland.co.uk/guidance/infofororg/index.html](http://www.disclosurescotland.co.uk/guidance/infofororg/index.html) Information from UNISON Scotland on this scheme can be found here: <http://www.unison-scotland.org.uk/briefings/237ProtectionofVulnerableGroupsImplementationNov2010.pdf>

**Further Information**

The Home Office Disclosure and Barring webpage

<http://www.homeoffice.gov.uk/crime/vetting-barring-scheme/>

Home Office Factsheet: Disclosure and Barring, what you need to know

<http://www.isa.homeoffice.gov.uk/PDF/DBS%20Summer%202012%20English%20leaflet%20web%20ready.pdf>

The Northern Ireland Executive Disclosure and Barring Factsheet: <http://www.dhsspsni.gov.uk/changes-to-barring.pdf>

The Disclosure Scotland Website is here: [www.disclosurescotland.co.uk/guidance/infofororg/index.html](http://www.disclosurescotland.co.uk/guidance/infofororg/index.html)