



# Independent Monitor

Annual Report 2015





## Introduction

This is the third annual report of the Independent Monitor and it is my pleasure to present the report for the period January to December 2015.

In my last report I presented two recommendations (attached at appendix A) which I had identified could make improvements to the disclosure process. In that report I also asked that my 2012-13 recommendation be reconsidered. This proposed the introduction of a new product, a role-specific certificate rather than workforce based. This would allow people who wanted to work in a specific role and that otherwise may be precluded if consideration of the wider workforce was the basis for the disclosure decision. I have received a response from the Government (attached at Appendix B) and have shown an update on each of my recommendations below.-

### 2014 Report Recommendations:

#### 1. Introduction of a formal timescale for disputing a disclosure.

I am pleased that the recommendation that a formal timescale is introduced has been accepted and is to be given further consideration. I welcome the opportunity to engage with the development of this key area in due course.

#### 2. Introduction of a formal structure to progress recommendations.

I am pleased that a structure is now in place and the first meeting has been held to monitor progress on my recommendations.

## Overview of the year

### Referrals.

The number of referrals I have received between January and December 2015 has increased significantly over those received in 2014. The total number of cases received rose from 310 in 2014 to 383 in this reporting year, an increase of over 23%. Whilst it is not possible to categorically state the reason for this increase, I believe it is in part due to the availability of the independent monitor process becoming more widely known. For the first time in my role I have declined to further review a number of cases which I have considered as 'aged' and where the purpose for which the certificate was originally requested is no longer available to an applicant or where I reasonably believe that it is no longer available. These cases are those where the dispute is made a number of months, or even years, after the certificate was originally issued. In many cases the original purpose for which the certificate was requested will no longer be valid, by which

I mean that the job is unlikely to still be available to the applicant due to the passage of time. In some cases it is clear that the applicant has no real complaint in relation to the information disclosed and that, in essence, they are using the system in order to refresh their Certificate free of charge. This is not the purpose of the IM role and in these cases I have asked the applicant to confirm whether the original position for which the certificate was issued is still open to them. If it is not or they have not replied I have then advised the applicant to seek a new certificate if they apply to work with children or the vulnerable in the future.

### **Northern Ireland**

The Northern Ireland Justice Act commenced on 2nd November 2015 and had the effect of extending the full role of the Independent Monitor to reviewing disclosure disputes made in Northern Ireland in the same way as it does in England and Wales currently. Work has been ongoing with Access Northern Ireland (ANI) and the Police Service of Northern Ireland to develop a process for dealing effectively with any cases received. To date a small number of referrals have been received which relate to Certificates issued by Access Northern Ireland and I am pleased that the system in place has effectively managed these disputes.

### **Judicial Reviews.**

There have been two cases in the reporting year where an applicant has challenged my decision by requesting a Judicial Review. This is the final recourse available to an individual who disputes the information disclosed by police on an Enhanced Criminal Record Certificate. In both of these (BW v Independent Monitor and PM v Independent Monitor) my decision has been upheld. Given that the role of Independent Monitor has only existed since 2012, it is to be expected that it would receive some level of legal challenge over time. I have reviewed the Judges' decisions with my legal support in order that any learning from them can be included in future decisions. These first tests of my role have been helpful in strengthening my decision making process.

### **Engagement**

Over the past year I have continued with my attendance at the Police National and Regional Disclosure Forums, as well as the Police Disclosure Portfolio Group meetings. I have visited the Disclosure and Barring Service (DBS) in Liverpool and Access Northern Ireland in Belfast. I continue to meet regularly with operational leads from the DBS, ANI and the police in order to identify issues of concern. My approach is to deal with such issues as they arise throughout the year rather than waiting for my annual report as the only vehicle to flag concerns and direct improvements.

One such issue is how the police were wording part of their disclosure certificates. In 2011 there was a review of criminality information undertaken by Mrs Sunita Mason. One of the recommendations of her report was that the police should include more information, in their rationale for their disclosure text, in relation to the potential risk posed by a person to the vulnerable.

This was a positive move intended to help employers to better understand the reasons for the disclosure. Police forces write this section of the disclosure in different ways, leading to inconsistencies in approach and raising concerns from applicants as to the subjectivity of some of the police wording. In some cases applicants were citing these paragraphs as reasons why they had lost a job or had been unsuccessful in an application rather than the presence of the actual information about them on the certificate.

In order to address this inconsistency and potential unfairness to applicants I have asked the DBS and police to consider an alternative method of complying with this recommendation. I am pleased to say that new guidance was issued by the DBS in the latter part of the year and I have asked police forces dealing with disputes to take this into consideration when reviewing their

original disclosure. Over time, this approach should reduce the numbers of disputes and also allow more balanced and factual information to be put to employers in order for them to make decisions about any potential risk.

### **Timeliness.**

I am pleased to report that I have not encountered any significant issues in terms of the amount of time that Police forces take to respond to my requests for information.

One area which does seem to slow the process down is the provision of court transcripts. The summing up of trial judges is useful in understanding any issues which may have arisen at court and this is particularly the case when an applicant, or their representative, state that the judge has made adverse comments or that a witness was found to be unreliable.

The issue here is that the police, in particular the police Disclosure Units, are not one of the agencies who are entitled to request and obtain court transcripts under current Ministry of Justice guidance. The interpretation of the guidance appears to differ around the country and some forces are required to seek permission from the trial judge before a transcript can be obtained. This process can take time and the inconsistency does cause delays in considering the applicant's appeal. Such delays impact on applicants and their ability to enter into employment.

I therefore recommend that for the purposes of Disclosure, that the Police are added to the list of those agencies that are able to obtain court transcripts without having to obtain specific permission from trial judges. **(Recommendation 1).**

### **Sampling of cases.**

Through the year I have also undertaken a sampling exercise of cases as is required under section 119B of the Police Act 1997. This year I reviewed forty eight cases from eight police forces and provided feedback to each on my findings.

### **Third Party Disclosures**

Many disclosures which are made each year contain no relevant information about an applicant but do include information about a third party who is believed to be associated with the applicant. This may be because they live at or have access to an applicant's address or are otherwise considered to be a risk to those people the applicant would be caring for at their work venue. A clear example of this is in the case of an individual seeking a certificate in order to become a childminder in their own home.

It can seem unfair to the applicant for the information relating to a third party to be included on a certificate and this is particularly the case if the relationship is aged, tenuous or if the third party is currently serving a prison sentence and therefore does not have current access to the applicant's place of work .

My position as Independent Monitor across England, Wales and Northern Ireland affords me the privilege of oversight of ways of working across Disclosure units. I have noted that there are inconsistent approaches to third party disclosures around the country. In 2015 I have received a total of sixty-four disputes classified as third party disclosures from a total of fourteen police forces. Over half of the third party disclosures originated from a single force. Although I only see a small proportion of the total number of disclosures made across the country, these figures do tend to support my view that there are inconsistencies amongst police forces.

Whilst there is guidance concerning third party disclosures for the police included in the Quality Assurance Framework (QAF), I would welcome a wider discussion with stakeholders to explore the possibility of tightening up the guidance in this area. This is in a similar vein to my 2013 recommendation on Mental Health which I am pleased to note was accepted and subsequently implemented.

I therefore recommend that a formal discussion is held with police, DBS and Home Office staff in order to develop a more consistent approach to third party disclosures and the development of more detailed guidance in this area. It is also important that these discussions reflect the position for Northern Ireland. **(Recommendation 2.)**

## Looking Forward

It is likely that elements of the Government's Extremism Strategy will be further developed in the forthcoming year. Part of that strategy relates to the disclosure, to employers, of information relating to extremism activity. I look forward to sharing my experience and oversight of disclosures and ensuring any policy objectives can be successfully delivered on the ground.

## Conclusion

This reporting period has been even busier than last year but I am pleased that my Secretariat has managed the additional work effectively. Over the coming year I will continue to work with partners and hope to see the development of those recommendations which have been accepted. The most important thing being that the rights of the vulnerable and those who seek to work with them are properly considered at all times.



**Simon Pountain**

## **Powers under which the Independent Monitor operates**

The Independent Monitor is appointed by the Secretary of State under section 119B of the Police Act 1997 and has two statutory duties relating to the disclosure of information on a person's Enhanced Criminal Records Certificate.

Firstly, in accordance with section 119B of the Police Act 1997 (1997 Act), the Independent Monitor must review a sample of cases in which police non conviction information is included, or not included, on enhanced criminal record certificates under section 113B(4) of the Act. The purpose of these reviews is to ensure compliance with Home Office Statutory Guidance on disclosure and Article 8 of the European Convention of Human Rights (ECHR).

Secondly, when a request for an Enhanced Certificate is made, an individual's details are referred to any police force which may hold information about the individual. This enables the force to check against their records for any information which they reasonably believe to be relevant to the prescribed purpose for which the certificate is sought and then consider if it ought to be disclosed. If an applicant is not satisfied with the information being disclosed they may apply to the Independent Monitor for a review. Under section 117A of the 1997 Act, the Independent Monitor has a role in reviewing those cases where a person feels that the information disclosed by police within a Disclosure and Barring Service Enhanced Criminal Record Certificate is either not relevant to the workforce they are applying for, or that it ought not to be disclosed.

## **Operation of the Secretariat and function of the Independent Monitor**

The Independent Monitor's role in the reviewing of referrals about information disclosed by police forces was introduced by the Protection of Freedoms Act (PoFA) 2012. A Secretariat to support the Independent Monitor to perform this function was set up in October 2012 and now consists of two full time members of staff.

Prior to October 2012 and the changes introduced in PoFA, an individual who was dissatisfied with information that appeared on their enhanced certificate only had recourse to appeal to the Chief Constable of the relevant force in relation to the accuracy of the text. If the applicant was unsatisfied with the outcome of this or the overall wording of the text then their only option was to request a Judicial Review of the disclosure decision, which would be costly to the applicant and to the DBS in both time and resource. The Independent Monitor role now acts as an additional layer of review before a person has to resort to Judicial Review.

Since its creation in September 2012 to the end of December 2015, the Secretariat has received a total of 1034 referrals from individuals who are concerned about information disclosed on their disclosure certificates. Case papers consist of the disclosure certificate provided by the DBS together with any dispute documents about the disclosure information that the applicant may have raised with the DBS previously. Once a case is received, the Secretariat will ask the police for information relating to the case and the applicant for any additional representations they may wish to make. Upon receipt of representations the referral case is put to the Independent Monitor for review.

In making a decision on the inclusion of information on a certificate, and following statutory guidance, the Independent Monitor gives consideration to:

1. Whether the information provided is accurate;
2. Whether the information provided is relevant to the prescribed purpose for which the certificate has been obtained (following policy changes in 2012 this is now generally for work within the child or adult workforces rather than specific to a particular role); and
3. Whether the information ought to be disclosed, including;

- a. What the legitimate aim of the disclosure is;
- b. Whether the disclosure is necessary to achieve that legitimate aim; and
- c. Whether the disclosure is proportionate, striking a fair balance between the rights of the applicant and the rights of those whom the disclosure seeks to protect.

All criteria are considered equally, there is no weighting. Once a decision has been made the Secretariat will write to the applicant, the DBS and the relevant police chief officer informing them of the Independent Monitor's decision.

In addition to providing decisions on requests for review of a chief officer disclosure of approved information, the Independent Monitor has also undertaken the required sample exercise under s119B (5) of the 1997 Act. The exercise has consisted of the sampling of police information provided on Enhanced Certificates for a number of forces. Following these reviews the Independent Monitor has provided feedback to forces to ensure quality and compliance with Statutory Guidance.

## **Clarification**

My role is different from the Independent Complaints Reviewer (ICR) for the DBS. As a statutory appointee, my role is to consider appeals from applicants disputing the inclusion of non-conviction information within their enhanced disclosure certificates issued by the DBS. Such certificates are required for those who wish to work with children and vulnerable adults and in some other specified areas such as taxi driving.

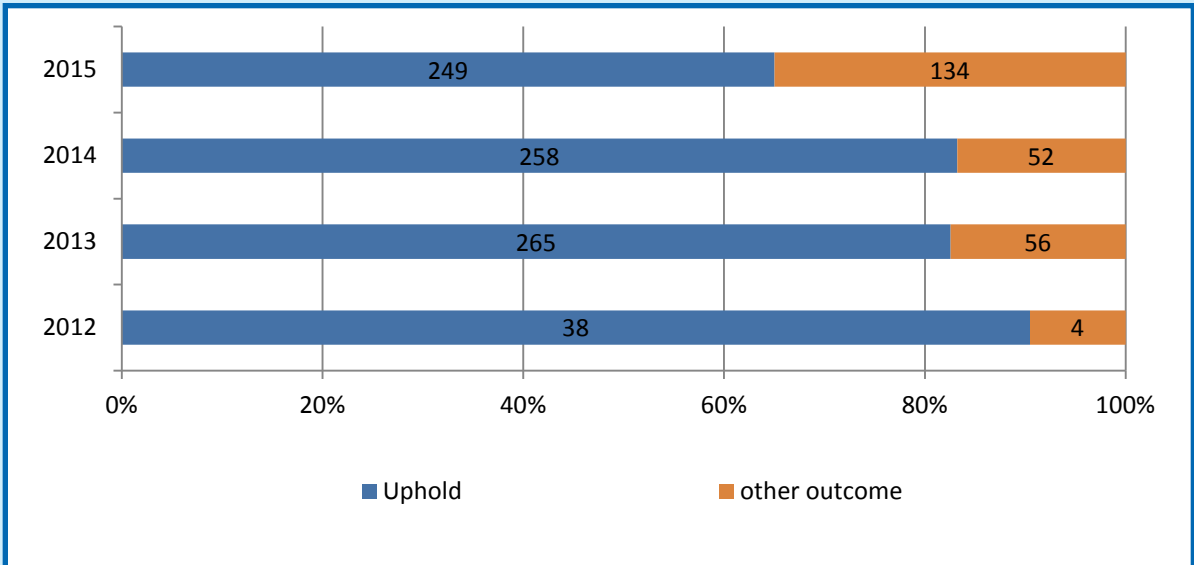
The ICR reviews complaints about the DBS and offers constructive advice about the way in which the DBS deals with customers and how the DBS handles complaints.



## Independent Monitor Case referrals: 2015 Summary

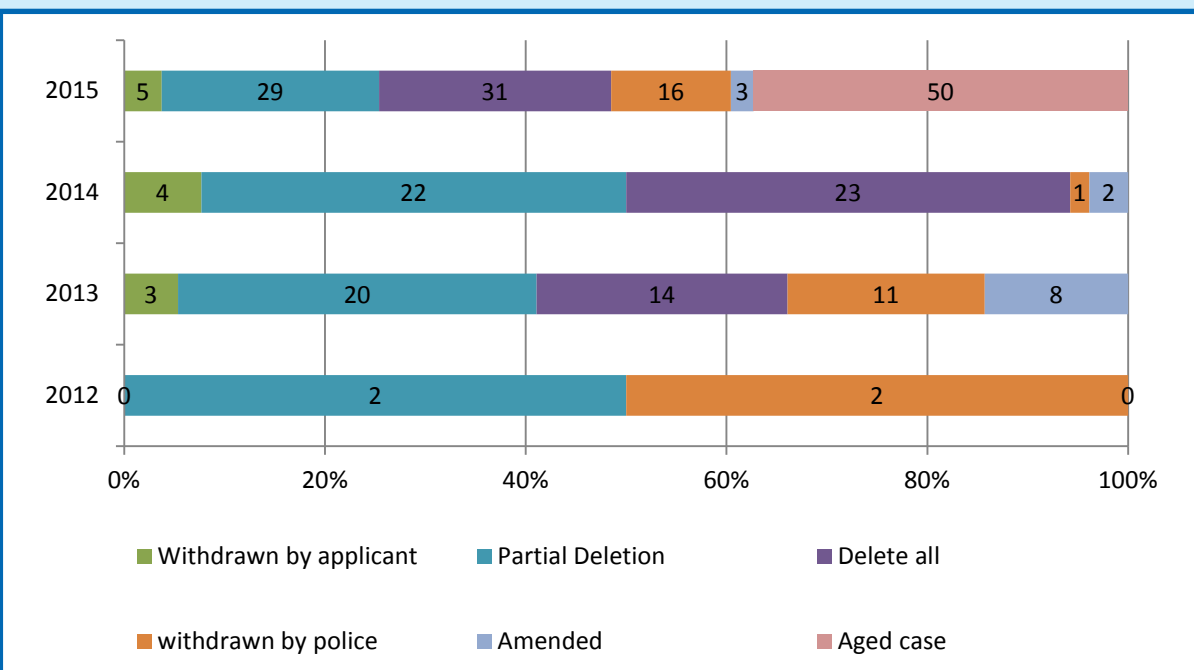
The chart below shows the outcomes of the referrals received by the Independent Monitor in 2015 compared with the previous years. It also shows the same information for the period between September and December 2012 following the introduction of the Independent Monitor role. 'Uphold' refers to those cases where I have supported the police disclosure in its entirety.

**Chart 1**



The following chart breaks down the 'other outcome' category above to show the way in which the cases have been dealt with.

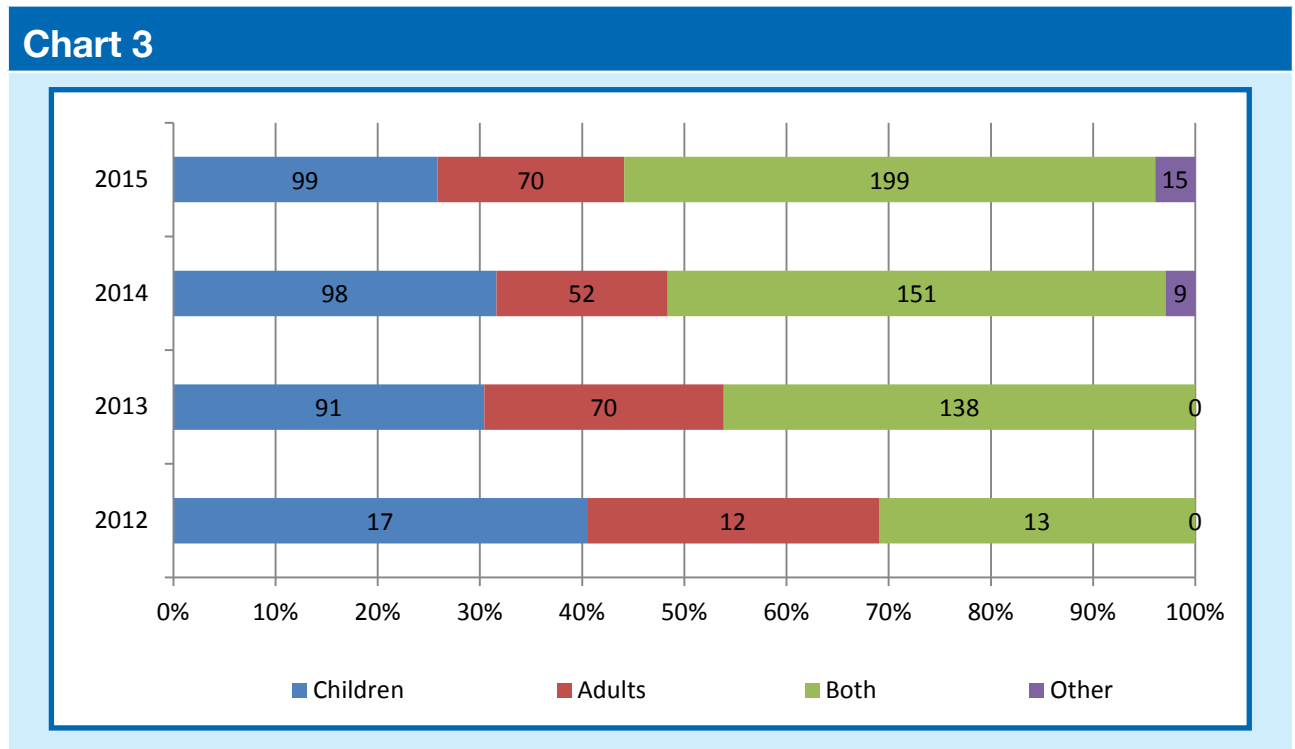
**Chart 2**



In general it can be seen that the total number of referrals has increased considerably on the numbers from last year. The main difference in the last year has been the number of cases I have considered to be aged and where the original purpose for which the certificate was requested no longer exists, and have not reviewed further (50 cases). As explained earlier in this report these are cases where, due to the length of time from the issue of the certificate and the initiation of the dispute, it is reasonable to believe that the purpose for which the certificate was requested, no longer exists. The development of this new category demonstrates how my role is evolving and continuing to make the best from my position of oversight. There is also a category shown in the chart above for amended cases. Occasionally there are cases where I feel that a disclosure requires some amendment rather than having text deleted. This may be where a deletion would leave the text grammatically incorrect or where I believe the disclosure is worded subjectively. In these cases I will negotiate with the Chief Officer in order to agree an amended form of words. There are no cases outstanding from previous years.

The following chart shows a comparison of the workforces for which applications for review have been received.

It can be seen from the chart that the majority of disputes are from applicants who have applied for both the Children’s and Adult’s workforces. In these cases more information is considered by police due to the wider portability of the certificate and it is therefore often the case that individuals are concerned that the information being disclosed is not relevant to the specific role applied for.



**Note** that there were no disputes recorded in the ‘Other workforce’ category in 2012 or 2013 as Taxi Drivers were considered as a part of the Children’s workforce during those years.

## Summary of recommendations

### Recommendation 1.

Those for the purposes of Disclosure, the police are added to the list of those agencies that are able to obtain court transcripts without seeking prior approval of the trial judge.

### Recommendation 2.

That a formal discussion is held between stakeholders within the DBS, Home Office and police, in order to develop a more consistent approach to third party disclosures through the development of more detailed guidance.

## **Appendix A: Recommendations made in previous Annual Report.**

### **Recommendations 2014**

#### **1. Introduction of a formal timescale for disputing a disclosure**

My recommendation is that there should be an introduction of a statutory timescale for the raising of a dispute. Over the past year I have noticed that a significant number of cases have been disputed some considerable period after the disclosure certificate was issued. In some cases this has been up to five years after the disclosure certificate was issued and, in most of these cases, the original purpose for which the certificate was requested will have lapsed as the role which was being applied for is unlikely to have been held open for a person over such a protracted period of time.

In these cases, if the applicant wishes to obtain work in, or volunteer for, one of the prescribed purposes requiring an Enhanced Disclosure Certificate (with or without an associated Barred list check) it would be more appropriate for them to apply for a new certificate. This would ensure that all of the information currently available to the police could be considered, using the current test of relevancy along with the latest statutory guidance and case law, before a decision is made regarding the wording of any proposed disclosure.

It therefore seems reasonable to me that if an applicant is not satisfied with the content of their disclosure certificate, they should be required to dispute it within a clearly defined time period. When an application is made for a particular role it is reasonable to assume that the position would be held open for a successful candidate whilst background checks were made. I believe that it is also reasonable to assume that, after a while, an employer would be less likely to hold a vacancy open. I have considered the amount of time that should be allowed for a dispute and would suggest that a post would be unlikely to be held open for longer than six months. The DBS currently encourage applicants to submit a dispute of their disclosure certificate within ninety days but this is not mandated. I believe that this is a reasonable timescale and I would therefore welcome the introduction of a statutory time scale for disputes of three calendar months.

#### **2. Introduction of a formal structure to progress recommendations.**

As this is now my second Annual Report I am keen that there is a structure developed to ensure that the recommendations from this and my previous report are progressed in a timely fashion. I would see this structure identifying ownership for each recommendation and recording milestones and progress. This will then ensure that the purpose for which the recommendations were made, i.e. the protection of the rights of the vulnerable and those who seek to work with them, are upheld. This progress will then be reported upon in future annual reports.

## Appendix B:



**Sarah Newton MP**  
Minister for Vulnerability,  
Safeguarding and Countering  
Extremism

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28 March 2017

Dear Simon,

Thank you for your 2015 Annual Report which I intend to publish on gov.uk shortly. I am grateful for your important work over this period. Your report provided a helpful insight into the disclosure of police information on enhanced criminal record certificates (ECRCs). The recommendations in your 2015 Report will be carefully considered. In your report you provided further commentary on the recommendations made in your previous reports and the two recommendations made in your 2014 report. I have given careful consideration to these and have set out our response below.

### **Recommendations from the 2014 Annual Report**

Your first recommendation is to introduce a statutory time limit for individuals wishing to raise a dispute with the Independent Monitor. You give the example of a dispute being raised some five years after the issuing of a certificate which does seem to be an inappropriate use of the dispute process. I support this recommendation. It will be necessary to demonstrate that any time limit is set appropriately to avoid adversely affecting individuals raising legitimate disputes. I have asked my officials to keep you updated on progress with identifying a suitable legislative slot.

Your second recommendation is to implement a process to monitor progress against your recommendations. My officials have put this in place and are working with you to keep you updated on progress.

**Recommendations from the 2012-2013 Annual Report**

Lord Bates responded to the recommendations made in your previous report in his letter of February 2015. As you are aware, he accepted your recommendation that the attention of police forces should be further drawn to the guidance in the Quality Assurance Framework (QAF) around considering mental health information for disclosure. Further to this, the statutory guidance on disclosure, to which chief officers must have regard, was reissued in 2015 with additional material on this issue.

Your second recommendation proposed that the Update Service should not be available in relation to home based occupations. Lord Bates' response indicated that Government could not agree with the recommendation. I maintain that position. While it is the case that the Update Service cannot accommodate changes in relation to other members of a household, the service does of course provide important information about the individual applicant. The DBS is looking at action to make the scope of the Update Service clear to registered bodies and employers. Where appropriate, an employer may wish to request a fresh certificate in order to check on other members of the household.

Your third recommendation was to introduce a new type of certificate with application limited to a single, specific role. Again, Lord Bates' response indicated that Government could not agree with the recommendation. I maintain that position. Criminal record certificates are intended to be relevant to employers within the sector for which work is sought. To introduce role specific certificates would require detailed descriptions of the duties to be undertaken in order to inform decisions as to which police information, if any, would be relevant and ought to be disclosed. It would also limit the portability of a certificate in a way that is contrary to the changes introduced by the Protection of Freedoms Act 2012.

Finally, you discussed the continued practice of some employers or registered bodies to suggest that they would employ an individual were certain information removed from a disclosure certificate. This is clearly unacceptable and I have asked the DBS to strengthen existing guidance to make the position clear.



**Sarah Newton MP**

**Table of previous recommendations.**

<b>Recommendation</b>	<b>Year made</b>	<b>status</b>	<b>Current position</b>
Mental Health	2013	Accepted	The statutory guidance has now been amended in respect of Mental Health cases and was issued in August 2015.
Home Based Occupations	2013	Partially Accepted	DBS amended the applicant and RB guidance in 2015 and promoted this in DBS News.
Workforce v Position Applied for	2013	Not Accepted	Issue raised again in 2014 Annual Report.
Registered Bodies	2013	Accepted	DBS worked with NACRO and CIPD to develop guidance for employers on how to handle and assess information that appears on a disclosure certificate.
Statutory Time limit for disputes	2014	Accepted and awaits further development.	
Formal process to review recommendations	2014	Accepted.	
Police Disclosure Units to have access to Court Transcripts	2015	Awaits	
Development of guidance on Third Party Disclosures	2015	Awaits	

