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The demise of the Criminal Records Bureau

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Abstract

This article critically analyses the operations of the Criminal Records Bureau ('the CRB') and seeks to determine why the Bureau closed abruptly in December 2012. It questions whether the decision to open in March 2002 was expedient, in light of the apparent flaws in the operational assumptions made by Capita Plc, the successful bidder for the CRB contract, and the long-standing problems with the criminal records data. The article then identifies three key failings in the administration of the criminal records checks which it is submitted quickly and decisively eroded public and political confidence in the Bureau. The article concludes by considering who, if anyone, is responsible for the apparent failure of the CRB, and what lessons might be learned by the organisation which replaced it.

Introduction

The high-profile child abduction and murder of Sarah Payne in 2000, coupled with the Soham murders in 2002, saw a marked rise in public fear of 'stranger-danger'.¹ This caused a paedophile panic² to set in which legitimised an exponential rise in the number of citizens subjected to criminal record checks; the figure had risen from 701,692 checks³ to 3.3 million between 1993 and 2008.⁴ All of this was administered by a newly created public-private body, the Criminal Records Bureau ('The CRB'), which opened in 2002.⁵ Employers,⁶ voluntary groups⁷ and public figures⁸ roundly declared their support for the extension of criminal checking and proudly reported the depth and scale of their own vetting processes. The Court of Appeal overturned the common law presumption against the disclosure of non-conviction data⁹ and instead created a threshold test that non-conviction data should be disclosed 'if it might be true';¹⁰ a decision which further facilitated the proliferation of vetting. The tide in favour of 'vetting everyone, everywhere' seemed to be inexorable – by 2007 the phrase 'CRB check' had entered ordinary lexicography¹¹ and a 'vetting epidemic' had set in.¹²

¹ T. Thomas, 'The One Stop Shop' (2 March 2001) 151 NLJ 298

² A. Williams and B. Thompson, 'Vigilance or vigilantes: The Paulsgrove Riots and policing paedophiles in the community: Part 1: the long, slow fuse' (2004) Pol. J. 2004, 77(3), 99 – 117

³ Home Office, Disclosure of Criminal Records for Employment Vetting purposes, Cm2319 (1993) 7

⁴ Criminal Records Bureau, Annual reports and accounts for the period 1 April 2012 – 1 December 2012 HC66 (20 May 2013) 14

⁵ Home Office, Government announces new measures to improve the Criminal Records Bureau, Press Release (27 February 2003)

⁶ S. McCormack, Councils tell heads to have all teachers checked (28 February 2006) The Guardian

⁷ Fair Play for Children, making progress on for the child's right to play, Annual Report (2004 – 5) 2

⁸ Home Office, Government announces new measures to improve CRB, Press Release (27 February 2003)

⁹ *R v Chief Constable of North Wales Police ex part Thorpe* [1999] QB 396

¹⁰ *R (on the application of X) v Chief Constable of West Midlands Police* [2004] EWCA Civ 1068 per Lord Woolf at [47]

¹¹ T. Thomas, 'CRB Checks' (2012) 176 JPN 167

¹² T. Pitt-Payne, 'Employment - The Shadow of the Past' (2009) 159 NLJ 1530 and C. Baldwin, 'The Vetting Epidemic in England and Wales' (2017) J. Crim. L. 81(6), 478 – 496

All of which makes the last few years quite remarkable so far as criminal records in England and Wales are concerned. A backlash¹³ against the vetting epidemic seems to have developed. Politicians have rowed back from their previous ebullient support for the vetting epidemic; the rhetoric has become more nuanced and there has been explicit executive support for the scaling back of the vetting regime.¹⁴ Public attitudes seem to have hardened in the face of some of the more high-profile examples of pernicious checking, likely influenced by media reports of children's authors being prevented from speaking in schools,¹⁵ and elderly flower-arrangers being barred from church,¹⁶ unless they undertook an enhanced CRB check. Simultaneously, the judicial position has markedly shifted, with new tests established and new, more critical approaches to interpretation of the vetting framework adopted.¹⁷

The most conspicuous example of this paradigm shift was the dissolution in December 2012 of the Criminal Records Bureau. The decision to do so was taken without warning, was never fully explained by the Government and has attracted scant academic attention. This article aims to extrapolate a rationale behind that decision. It will do so by critically evaluating the operations of the Bureau with a particular focus on the mistakes made in its conception and administration and the public and political reaction to those decisions. Key failings in the operational execution of the CRB's functions will be identified, along with the detrimental impact these caused on the public and executive perception of the Bureau and its workings. The author concludes by seeking to ascertain what lessons, if any, can be learned from the failure of the CRB for the organisation which immediately preceded it.

Conception and teething problems

On 14 December 1998, then Home Secretary Charles Clarke announced plans to open a new 'Criminal Records Bureau' to be solely responsible for the administration of the new criminal record checks instituted by recent legislation. Clarke told Parliament that 'dangerous people need to be stopped from working with children and young people. The creation of the CRB is an important step towards achieving that.'¹⁸ The Labour administration invited bids to run the Bureau as a public-private partnership with the Home Office¹⁹ and on 20 July 2000, it was announced that Capita had won the right to sell criminal records²⁰ and a 10-year contract to do so was signed on 3 August 2000.²¹

¹³ T. Thomas, 'Old Criminal Records Playing a Familiar Tune' (2012) 176 JPN 539

¹⁴ Theresa May, then Home Secretary, pledged in October 2010 to scale back vetting to 'common sense levels' (see Hansard, House of Commons debate 2 October 2010, column 77WS to 78WS)

¹⁵ School safety 'insult' to Pullman (16 July 2009) The BBC.

¹⁶ D. Harrison, Cathedral flower ladies quitting over criminal record checks (12 December 2010) The Telegraph.

¹⁷ *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2009] UKSC 3 and *R (on the application of P) v Sec. of State for the Home Dept.* [2017] EWCA Civ 321.

¹⁸ Home Office, Criminal Records Bureau to Strengthen Child Protection Safeguards (14 December 1998) Press Release 494/1998.

¹⁹ Home Office, Criminal Records Bureau – Outcome of the Timetable review, Press Release 441/1999 (16 December 1999)

²⁰ Home Office, Capita wins competition for Criminal Records Bureau programme, Press Release 211/2000 (20 July 2000)

²¹ Home Office, Criminal Record Checks to Protect Children and Vulnerable Adult on the Way, Press Release (3 August 2000)

The problems mounted before the Bureau had opened for business. The principal concern lay with the raw criminal records data, which had been in an inadequate state for decades.²² It was originally intended that the CRB would open in July 2001, but a Parliamentary Select Committee was so concerned with the quality of the raw data that the start date was deferred until further investigations were made.²³

In July 2000, HM Inspector of Constabulary published a report on his review of the PHOENIX police database which contained the criminal records data²⁴ and found incorrect recording, missing records, incorrect classification and an overall error rate of between 15 – 65% on inspected files.²⁵ Such was the general concern that the Home Secretary addressed the issue in Parliament, telling the Commons that ‘the Home Office certainly does not have a defence against the charge that the police records system is seriously inadequate...This has been the case consistently for a very long period of time...It is a very bad state of affairs’.²⁶

Another grievous example of the problems occurred in June 2000 when the Home Secretary ordered an inquiry into the removal of 140,000 caution records from the Police National Computer.²⁷ Indeed, such was the parlous state of the criminal record collection that Terry Thomas claimed there to be a real possibility of Enforcement Notices being served on the police by the Information Commissioner.²⁸ The overall data concerns were effectively two-fold: ‘many of those with past cautions may be able to obtain a clean bill of health while others may initially incriminate the innocent who must then seek to clear their names through a protracted administrative procedure’.²⁹

Delays and backlogs

Against this backdrop, the CRB finally opened on 11 March 2002.³⁰ It was overwhelmed almost immediately. The number of applications for checks far outstripped the capacity of the fledgling organisation’s ability to process them and by July 2002 there was a minimum six-week turnaround time for certificate requests.³¹ There seemed to be an enormous backlog of applications: one report claimed that 206,153 requests for enhanced disclosures had been received between March and August 2002 but only 58,000 certificates had been issued.³²

²² C. Baldwin, ‘The Vetting Epidemic in England and Wales’, (2017) *J. Crim. L.* 81(6), 478 – 496 at 482 – 3.

²³ The Home Secretary conceded that the criminal records data was ‘seriously inadequate...a very bad state of affairs’. See Select Committee on Home Affairs, *Second Report – Criminal Records Bureau HC227*, (2000 – 1)

²⁴ K. Povey, K, *On the Record – Thematic inspection report on Police Crime Recording, the Police National Computer and Phoenix intelligence Systems Data Quality*, HMIC: London (July 2000)

²⁵ *Ibid.* at ix

²⁶ *Ibid.* at para.24

²⁷ *Police lose 140,000 records* (18 June 2001) *The BBC*

²⁸ T. Thomas, ‘The National collection of criminal records: a question of data quality’, (Nov 2001) *Crim LR* 886 – 96 at 896

²⁹ C. De La Mare and K. Sandison, ‘Criminal Convictions’, (1 May 2001) *Employment Law Newsletter* 81 at 86

³⁰ S. Room ‘Meeting the challenges of Climbie and Soham – part 3’ (16 April 2004) 154 *NLJ* 590

³¹ D. Hayes, *Police Checks delays build backlogs in recruitment and fostering* (18 July 2002) *Community Care* (issue 1431)

³² *Ibid.*

Against this chaotic opening, Holly Wells and Jessica Chapman were abducted near their home in Soham on 4 August 2002. On 17 August 2002, the caretaker of the local college, Ian Huntley was arrested and ultimately charged with their murder.³³ Amid the subsequent frenzied media reporting of the *Soham* case,³⁴ the Education Minister reacted by issuing guidance that all teachers must be CRB checked before the new school term.³⁵ This opened a floodgate of fresh applications for which the already overloaded CRB was ill-equipped to cope. By August 24th, the BBC were reporting that 100 extra staff had been drafted in to help clear a backlog of 100,000 unprocessed applications.³⁶ News media broadcast footage of empty classrooms as children were sent home from school because teachers had not received their CRB certificates in time³⁷ and hundreds of new teachers could not start work because ‘their ‘clearance’ had not come through’.³⁸

The Home Secretary David Blunkett intervened and sent in a team of troubleshooters, led by Patrick Carter, to investigate and resolve the crisis.³⁹ Checks on those seeking to work with vulnerable adults were suspended until the backlog of teacher applications was resolved.⁴⁰ Blunkett told reporters that he was ‘concerned at the ongoing problems that have beset the CRB’ and was ‘determined that we will overcome these difficulties to ensure this vital new public service operates effectively’.⁴¹ The crisis concluded only when the Education Minister recognized that the problems were sufficiently grave that her only option was to retract her initial guidance. This was done on 4 September and new guidance, which instead permitted teachers to work after a List 99 check only, was published.⁴²

The respite was temporary. In October 2002, NHS management wrote to the Government to plead that the CRB prioritise checks on medical staff to alleviate serious understaffing issues caused by a backlog in processing the necessary CRB checks.⁴³ Carter and his team reported back to the Home Secretary in December 2002 but although ten key recommendations were presented to Parliament in February 2003,⁴⁴ ministers were criticized for refusing to publish a full report, citing commercial confidentiality, with one MP describing the decision as ‘an outrage’.⁴⁵ One of the recommendations was to delay the implementation of the basic criminal checks until ‘CRB systems have been developed to provide a substantially greater capacity’. The Government agreed and postponed the introduction of the basic checks.⁴⁶ The

³³ *R v Ian Huntley* [2005] RWHC 2083 at [4 – 5]

³⁴ K. Hanley, ‘Pre-Trial Publicity: Press and Prejudice’ (15 March 2007) LS Gaz, 20

³⁵ W. Woodward and A. Naseem, School vetting crisis deepens (30 August 2002) The Guardian

³⁶ Concern over school staff checks (24 August 2002) The BBC

³⁷ S. Laville and J. Pope, Pupils hit by crisis over staff checks (30 August 2002) The Telegraph

³⁸ Above n.11

³⁹ K. Day, ‘Blunkett appoints trouble-shooters at the CRB’, (2002) Public Finance Sept.(13 – 19) 7

⁴⁰ Above n.13

⁴¹ Above n.35

⁴² History of checks U-turns (4 September 2002) The BBC

⁴³ J. Booth, Crisis over vetting in children’s hospitals (20 October 2002) The Telegraph

⁴⁴ HC Deb 27 Feb 2003 c.33WS

⁴⁵ HC Deb 30 April 2003 c.114WH

⁴⁶ Above n.44 at c.35WS

postponement lasted fifteen years: basic checks were only made widely available on 18 January 2018.⁴⁷

Much of the problem stemmed from the application process. It had been presumed that most applications for checks would be made electronically, but in reality the CRB was ‘drowning in paper’: in April 2003 some 80% of applications were made in written form.⁴⁸ This failure to recognize the likely preferred method of application was later attributed to a failure to properly consult with registered bodies prior to opening,⁴⁹ or, as Edward Leigh MP bluntly put it, there was ‘not enough spadework done.’⁵⁰

Delays persisted. Questions asked in Parliament in June 2003 revealed that in its second six-month period of operation, the CRB had processed only 19.4% of standard disclosure requests within one week and 52.4% of enhanced checks within three weeks (as against targets of 95%).⁵¹ Paul Burstow MP lamented that ‘the system was not fit for purpose and was not ready to cope: it should not have gone live’⁵²

The backlog was not cleared in full until June 2003.⁵³ Although delays persisted – in 2008 £154,420.55 was paid *ex gratia* to 823 individuals who had lost earnings as a result of delays in processing checks⁵⁴ and a total of 3,733 complaints were received relating to delay⁵⁵ – by February 2004 the Bureau was meeting its operational service targets. It was doing so however, at least in part, by amending the targets themselves: 92% of enhanced checks (against a target of 90%) were being processed in four weeks, though the previous target had been a three-week turnaround. The processing time for standard checks was doubled, from one-week to two-weeks, and the target of 95% reduced to 90%.⁵⁶

Capita made a series of critical assumptions in developing the operational processes of the CRB. It failed to recognise that employers would likely prefer to send applications in batches, rather than individually. It also failed to recognise that there would be seasonal peaks in applications, particularly in summer when new teachers were recruited.⁵⁷

Most damaging of all, however, was the error in presuming that the majority of applications for checks would come by telephone and electronically, rather than in paper form. Capita had assumed that 85% of applications would be made by telephone and that the majority of the

⁴⁷ News Story – New DBS basic check service goes live (18 January 2018) Disclosure and Barring Service Online

⁴⁸ Above n.45 at c.103WH

⁴⁹ Criminal Records Bureau – Delivering Safer Recruitment? (12 February 2004) The National Audit Office 23

⁵⁰ Criminal checks agency criticised (12 February 2004) The BBC

⁵¹ HC Deb 3 June 2003 c.137W

⁵² Above n.45. at c.108WH

⁵³ Above n.49 at 15

⁵⁴ HC Deb 18 December 2008 c.1073W

⁵⁵ Ibid. at c.1074W

⁵⁶ Above n.49 at 34

⁵⁷ Ibid at 23, para.3.13

remainder would be made electronically. It therefore built a call-centre based system, rather than anything that might support paper-based applications.⁵⁸

This mistake stemmed from a clear failure to conduct proper market research prior to opening. It was only in the early months of 2001 that Capita held roadshows with some 5,000 participants to test out the application process and these made it apparent that the majority preference among registered bodies would, in fact, be for paper applications. By this time, so far as Capita were concerned, it was largely too late – the call-centre was in place and the IT system, which did not support keying in data from paper forms, was already largely *in situ* and there was no realistic prospect of creating a new system if the ‘go-live’ date was to be met.⁵⁹ The position was simple – either the opening of the Bureau was delayed again, likely exposing Capita to substantial criticism, or they took the risk and opened.

Capita chose the latter and walked headlong into a major furore, played out in full view of the public, courtesy of extensive negative media reporting. When the roadshow predictions came to pass, and 80% of applications came in paper form, the CRB was simply unable to cope. It had spent millions of pounds building a system which was entirely incompatible for their customer preference. Had Capita done its research properly, and used it better to influence their decision making, they could have corrected their assumptions and prepared accordingly. They didn’t, and so instead the CRB ‘drowned in paper’ and faced a barrage of criticism for it.

It is possible, however, that the CRB may have recovered from this auspicious beginning had events entirely out of their control not overtaken it. The revelation that the alleged perpetrators at Soham both held positions at education establishments⁶⁰ sparked a political storm and caused various ministers to make reactive pronouncements and policy decisions which inevitably resulted in a deluge of new applications for checks. This deluge came at a time when the CRB was already facing its first peak period for applications – the late summer lead to the new school term.

When the Bureau predictably failed to cope, it resulted in a widespread public backlash, fuelled in large part by rabid media reporting. Headlines portraying ‘a crisis’ and scenes of ‘chaos’ appeared routinely.⁶¹ Even when the majority of backlogged claims were processed, every subsequent delay was deemed newsworthy and generated further negative headlines.⁶² This continued for around six months and did untold damage to the reputation of the Bureau.

In many respects, the Bureau was an unfortunate victim of the crisis which engulfed it in the summer of 2002. For it to have to deal with the inevitable aftermath of a high-profile murder of two schoolgirls by school employees was, so far as the CRB was concerned, an extremely

⁵⁸ Ibid. at 22

⁵⁹ Above n.49 at 2, para.8

⁶⁰ Huntley’s accomplice, Maxine Carr, was a teaching assistant at the school attended by both victims. See M. Bichard, The Bichard Inquiry Report, HC653 (22 June 2004) 23 – 24.

⁶¹ For example P. Johnson, Crisis team for school vetting shambles (7 September 2002) The Telegraph.

⁶² A. Travis, Probation officers left off vetting list (28 December 2002) The Guardian.

unfortunate and untimely happenstance. It might be argued that they would have been better placed to cope had they taken more research-based operational decisions, but it is submitted that even a fully operational, paper-based application system would have struggled under the weight of hundreds of thousands of new, urgent applications for checks.

Moreover, the initial policy decisions which created the chaotic flood of applications were not theirs. They were Executive decisions taken by ministers, who made them without consulting the organisation which would be charged with administering them or without properly considering whether the already stretched Bureau could cope. The Education Minister, Estelle Morris, knew that the CRB was struggling to cope even before the *Soham* crisis emerged; in May 2002 she had complained to the Home Secretary about the delays then being faced by teachers awaiting checks.⁶³ Yet in her eagerness to be shown to be acting decisively, she failed entirely to consider the practical ramifications of her directive that all teachers must be vetted before starting work. She should have known that there was no realistic prospect of the CRB being able to process hundreds of thousands of applications in the two weeks between *Soham* and the start of the new school term.

She must, therefore, take her share of the responsibility for ignoring those issues and making knee-jerk decisions which attempted to appease public anger but ultimately inflamed it. Morris recognised her failings and resigned in October 2002, telling Parliament that she ‘had not done as well as she should have done’.⁶⁴ The Bureau might have considered itself unfortunate that media and public anger was largely turned against it, rather than Morris and the other ministers whose ill-conceived decisions overburdened it.

Rising costs

It had been anticipated that each application should cost £13.10 to process, yet the real cost to Capita was £33.50 for standard and £38.50 for enhanced certificates.⁶⁵ It was clear by 2003 that the cost to applicants would need to be increased to help cover this significant shortfall and legislation was passed to increase the cost of a standard check to £24 and £29 for enhanced checks.⁶⁶

This was a very significant price rise: both had previously cost £12. A Standing Committee was convened to consider the increase and ultimately approved it (by 9 – 6 majority), though one member said that ‘it is obvious that we are considering a failed institution that needs remedial action. Who will bear the burden of that action? It appears that customers and taxpayers will have to bail out the flawed project...That is scandalous’.⁶⁷ Another added that ‘the CRB is a monopoly, and it has been incompetently run. All the estimates have been

⁶³ Above n.35

⁶⁴ Education secretary resigns (25 October 2002) The BBC Online

⁶⁵ Above n.52

⁶⁶ Police Act 1997 (Criminal Records) (Amendment No. 4) Regulations 2003 (S.I., 2003, No. 1418)

⁶⁷ Tenth Standing Committee on Delegated Legislation, Wed. 9 July 2003 c.3

hopelessly wrong, and it has been a shambles'.⁶⁸ The 'shambles' saw Capita fined £1.8 million by the National Audit Office ('the NAO') in February 2003.⁶⁹

A further NAO report in February 2004 showed that the Bureau would not break even until 2005/6 and that the taxpayer was funding a shortfall of £68.2m.⁷⁰ The cost of checks was increased again in April 2004, to £28 and £33, to help reduce the financial deficit.⁷¹ Another fine, of £1.9m, was levied by the NAO for 'failure to meet service levels from February 2003'.⁷²

While Capita were being fined by the NAO, they were concurrently receiving significant sums from the public purse. A Commons Committee of Public Accounts was convened in 2004 to investigate the spiraling costs of running the Bureau. It emerged that Capita had originally bid £250m over ten years to run the Bureau – almost £130m less than PriceWaterhouseCooper's unsuccessful bid – but that this was predicated on an application process which would be 85% call-centre based.⁷³ As shown above, those predictions proved entirely flawed, and John Trickett MP described the accompanying costs-estimates as 'hopelessly optimistic'.⁷⁴

Capita needed more money and asked the Government to provide it. It was eventually agreed that they would be paid £400m, rather than £250m, over the life of the contract⁷⁵ for what Richard Bacon MP described as 'a slower service that is delivered a year late and it provides less than did originally'.⁷⁶ This led the Committee to conclude that this was 'one of the most incompetently let contracts this committee has seen... We got the highest tender rather than the lowest in the end'.⁷⁷

Parliament eventually also approved a supplemental payment of £3.6m 'for the unexpected overload of paper applications'.⁷⁸ In the fiscal year 2004/5, the CRB posted an operational deficit of £8m which once again was 'rectified' by public money.⁷⁹ The revised break-even target of 2005/6 was ultimately missed: the Bureau recorded an operational deficit for the fourth successive year, albeit a much reduced one at £2.2 million.⁸⁰ It was not until 2007, when it recorded a £13.6m surplus, that the CRB finally became self-funding.⁸¹

⁶⁸ Ibid. at c.20

⁶⁹ Ibid. at c.22

⁷⁰ Above n.49 at 5

⁷¹ Ibid.

⁷² Above n.49 at 31

⁷³ House of Commons Committee of Public Accounts, Criminal Records Bureau: delivering safer recruitment? HC453 28 October 2004 Ev.4

⁷⁴ Ibid. at Ev.6, Q43

⁷⁵ Ibid. at Ev.5, Q33

⁷⁶ Ibid. at Q34

⁷⁷ Above n.73

⁷⁸ R. Bacon and C. Hope, *Conundrum: Why every Government gets things wrong and what we can do about it*, Biteback Publishing, 2013) Ch.5

⁷⁹ Criminal Records Bureau – Annual Report and Accounts 2004/5 HC369 (20 July 2005) 18

⁸⁰ Criminal Records Bureau – Annual Report and Accounts 2005/06 HC1527 (24 July 2006) 12

⁸¹ Criminal Records Bureau – Annual Report and Accounts 2006/07 HC852 (25 July 2007) 8

It is submitted that the costs spiral which consumed the CRB in its first five years was driven by three key factors. The first was the aforementioned failure of Capita to conduct proper research before developing and instituting operational systems. Capita's original tender was costed on the creation of a call-centre based application process which was almost entirely rejected by its intended market as soon as Capita proposed it to them. The Bureau then spent years, and tens of millions of pounds of taxpayer's money, trying to rectify its error by converting its operations to a paper-based system.

At a time when it was struggling to emerge from the backlog crisis, the revelation that Capita was in receipt of public money to rectify problems created by their own failure to properly anticipate the preferred means of applications clearly had the potential to cause more reputational harm to the Bureau. Media reporting, which included an article describing the funding amendments as part of 'a package of urgent measures designed to put the troubled CRB back on track'⁸² and another which opened with the headline '£19m bailout to rescue criminal records office',⁸³ likely further exacerbated the damage.

The second key factor was the Government's decision to allow charities free access to criminal checks.⁸⁴ Whilst a well-intentioned (and vote-winning) measure, the financial ramifications of that decision were obvious – in 2004/5 alone the CRB issued half a million free certificates which cost the Bureau £17m in administrative fees and lost revenue.⁸⁵ In a year when the Bureau posted a deficit of £8m, that lost revenue would have been sufficient to negate the necessity of a public fund injection.

The third, and perhaps most telling, factor which resulted in significant cost deficits was the Bureau's inability to issue 'basic' certificates. The decision, taken by the Government in the wake of the backlog crisis in 2002, was certainly justifiable so far as the need to control the flow of applications at a time when the CRB was struggling to cope with numbers. It is, however, unlikely that the Government needed to wait until January 2018 to finally begin processing basic checks and, in doing so, it effectively changed the terms of its contract with Capita and denied them access to a significant revenue stream.

The basic check is designed to provide details of all unspent convictions recorded against an applicant.⁸⁶ They are also designed to be suitable for any applicant whose employment/voluntary position does not involve regular or unsupervised contact with children or vulnerable adults.⁸⁷ As the majority of employment in England and Wales does not require contact with children or vulnerable adults, it might be presumed that the basic checks would outnumber the other checks and, it is submitted, quite substantially. With one of (if not the) principal anticipated revenue streams unavailable to it, it is perhaps unsurprising that the CRB

⁸² A. Travis, Criminal Vetting for all who change jobs is axed (28 February 2003) *The Guardian*.

⁸³ R. Ford, £19m bail out to rescue criminal record office (6 June 2003) *The Times*.

⁸⁴ See C. Baldwin, *The Vetting Epidemic in England and Wales* (2017) *J. Crim. L.* 478 at 487

⁸⁵ Above n.79 at 5

⁸⁶ Per s.112 Police Act 1997

⁸⁷ Above n.49 at 9

found itself requiring Government payments and significant price increases to balance the books in the first five years.

Two of these three factors were outside of the control of Capita. Once more, it is perhaps fair to suggest that the CRB can count themselves somewhat unfortunate that they were adversely affected by decisions taken outwith their control. The harshness of this was made more manifest by the subsequent negative public, press and political reaction to the inevitable price increases which focused solely on the Bureau and which took a too superficial approach when a more in-depth extrapolation was merited.

One final issue should be noted. By insisting upon a self-funding, public-private CRB, the Labour administration effectively presented the Bureau a stark choice. Either prices be increased indefinitely to cover running costs or the volume of disclosures had to increase to such a point that sufficient revenue is generated.

It is submitted that, in reality, that choice was a pyrrhic one. Prices can only be raised until a tipping point is reached and employers become discouraged from making applications on cost-prohibitive grounds. The only realistic option, therefore, was to increase the volume of criminal checks. This was not an accidental happenstance. One of the performance measures by which the CRB was assessed from its inception was the volume of disclosures produced: indeed every CRB annual report since the first commented upon it. In 2006-7, for example, the annual report provided that: ‘the CRB is now self-funding...Undoubtedly the continuing increase in disclosure volumes had been a significant factor. Large elements of the agency’s costs are fixed and as volumes have increased each disclosure’s share of these fixed costs has decreased’.⁸⁸ This allowed the price of applications to stabilise and in turn encouraged more applications.

The Government’s insistence on a self-funding Bureau, which actively encouraged the CRB to widen its influence in an attempt to increase volume of applications, deliberately facilitated the vetting epidemic in England and Wales.⁸⁹

Errors and omissions

As has been shown, concerns were raised as to the likely accuracy of the certificates to be issued by the CRB prior to the ‘go-live’ date. These predominantly related to the paucity of the data held on the Pheonix police database which would be used for checks. The condition of the data was so concerning that the Information Commissioner singled it out for particular criticism in her first annual report, stating that ‘substantial improvements’ were required if the CRB was to be a success.⁹⁰ The Policy and Data Sources manager at the CRB stated that: ‘we fully recognise and share the concerns that have been expressed about delays in inputting data onto the Police National Computer and about incomplete data and inaccuracies. The problem needs to be tackled’.⁹¹

⁸⁸ Above n.81 at 6

⁸⁹ Above n.12

⁹⁰ R. Huseyin, ‘The Commissioner’s Annual Report’ (1 September 2001) PDP 1 8 (3)

⁹¹ R. Huseyin, ‘News & Views – Criminal Records Bureau at risk’ (1 August 2001) PDP 1 7 (1) 5

There simply wasn't enough time. Almost inevitably, mistakes were made on certificates as soon as the CRB started issuing them. Initially the Bureau attempted to blame these made by applicants on their forms, claiming that these resulted in errors being made,⁹² but there was no such excuse in September 2002 when the CRB was forced to admit that it had sent criminal record checks to the wrong employers. The Association of Colleges, whose members had requested checks on their staff, told the BBC that they had received checks on social care and NHS staff instead and were so perturbed that they had reported the issue for investigation by the Information Commissioner.⁹³

In the same month a former primary school headteacher was awarded £2,500 in compensation from West Midlands police after a CRB check wrongly showed that he had been previously convicted of an indecent assault of his stepdaughter. It transpired that he didn't have a stepdaughter and that he had been mistaken for a man who shared his name and date of birth but who did have a criminal record.⁹⁴

By 2003, Capita boasted that they had processed around 1,000,000 applications and had an error rate of 'just' 1%. In a resulting Parliamentary debate, one MP noted that Capita's claims may 'sound very reassuring' but when the total number of checks carried out totals more than one million in the given period this 'means that 10,000 people were wrongly assessed. Those people were either certified as no threat when they are, which is extremely serious for the people they are working with, or assessed as being a threat when they are not, which is extremely serious for the applicants and the people who wish to employ them'.⁹⁵

Time did little to dissipate the problem of inaccurate or erroneous disclosures. In April 2004, an answer to a written Parliamentary question from Mark Oaten MP revealed that in the preceding twelve months, some 193 applicants were wrongly labelled as offenders.⁹⁶ Responding to the now stock Home Office defence that mistakes were made in only 'a tiny proportion' of checks, Oaten told the press that:

This is another example of the shambolic state of affairs at the CRB. Every single mistake of this kind made by the CRB is extremely serious and it is not acceptable for the Home Office to dismiss this as a minor issue. These mistakes can make a massive difference to people's career prospects when they are wrongly labelled as criminals.⁹⁷

It is arguable that, at this embryonic stage of the Bureau's existence, the issue of mistakes and omissions, whilst controversial and widely reported, remained somewhat in the background as compared to the issues of delay and increasing costs. However, when those matters began to

⁹² Errors in school checks (2 September 2002) The BBC

⁹³ Confidential records 'sent in error' (18 September 2002) The BBC

⁹⁴ M. Shaw, False record victim paid £2,500 (27 September 2002) Times Educational Supplement

⁹⁵ Above n.45 at c.112WH

⁹⁶ HC Deb 19 April 2004 c.92w

⁹⁷ H. Mulholland, Home Office admits to vetting errors (16 April 2004) The Guardian

subsidy as the backlog was eliminated and the Bureau became self-funding so that the cost of checks stabilized,⁹⁸ the issue of erroneous certificates became the focal point for criticism.

Academic criticism began to surface – in 2005, for example, Jan Miller reported that around one-third of employers had complained that CRB checks provided inaccurate information.⁹⁹ The issue caused consternation in Parliament again in April 2006 when Mark Oaten repeated his earlier Parliamentary question and the subsequent response revealed that a further 1,472 erroneous certificates had been issued since his last request in March 2004.¹⁰⁰ The BBC reported that once such incident saw one woman refused a job with a charity after a check mistakenly identified her as a convicted shoplifter¹⁰¹, while The Guardian bemoaned ‘the defamation of 1,500 innocent public servants’.¹⁰²

A further question in Parliament in June that year showed that the total number of upheld complaints relating to mistaken disclosures since the CRB’s opening to the end of the 2005/6 financial year to be 2,273.¹⁰³ The Government response was emphatic: one minister baldly declared that ‘the CRB must err on the side of caution when an individual has the same or very similar personal details to those of someone who has a criminal record. This is because it is better to be safe than run the risk of letting an inappropriate person through’.¹⁰⁴

This ‘cautious’ approach continued to disrupt lives and cause significant individual hardship. In 2007, the media reported that one woman had lost two jobs and was currently suspended from a third after her CRB check continued to show, incorrectly, that she had drink-driving and drug-related convictions.¹⁰⁵ In 2008 it was reported that 680 checks had been issued which implicated innocent people in criminal offences.¹⁰⁶ A CRB spokesman repeated the excuse provided the year prior by the minister, stating that ‘the Criminal Records Bureau's first priority is to help protect children and vulnerable adults, and we will always err on the side of caution to help ensure the safety of these groups’.¹⁰⁷ One shadow minister retorted that ‘Nearly 700 mistakes that could ruin people's lives is 700 too many. There is an emerging crisis of public confidence in the handling of this public information’.¹⁰⁸

That crisis deepened in December 2008 when it emerged that the CRB had been somewhat selective in the figures they had released to that point and, in fact, the number of disputes which had resulted in an amended certificate were significantly higher than previously claimed. An

⁹⁸ There were no price increases between 2006 – 09 and indeed the cost of a standard check was reduced in 2009 by £5. See Home Office, Criminal Records Bureau reduces fees, Press Release 201/2009 (1 October 2009)

⁹⁹ J. Miller, ‘News – Long wait to check staff criminal records’ (12 August 2005) 155 NLJ 1230

¹⁰⁰ HC Deb 11 May 2006 c.511w

¹⁰¹ Criminal records mix-up uncovered (21 May 2006) The BBC

¹⁰² S. Jenkins, No number of sackings can salvage this broken system (24 May 2006) The Guardian

¹⁰³ HC Deb 28 June 2006 c.506W

¹⁰⁴ Ibid. at c.507W

¹⁰⁵ Women in wrong identity blinder (25 June 2007) The BBC

¹⁰⁶ C. Hope, Hundreds of innocent people ‘wrongly branded criminals’ by CRB checks (4 July 2008) The Telegraph

¹⁰⁷ Crime check errors ‘regrettable’ (5 July 2008) The BBC

¹⁰⁸ Above n.106

answer to a Parliamentary question revealed that in 2007/8, 2,785 disputes as to accuracy of information on a certificate had resulted in an amendment and that the total number of similar amendments since 2002/3 was actually 12,255.¹⁰⁹ These figures included disputes regarding ‘soft’ disclosures on enhanced certificates and cases of mistaken identity.¹¹⁰ Helen Hart argued that ‘given the scale of the operation, it is inevitable that mistakes will be made’¹¹¹ but Lord Marlesford disagreed, declaring to the House of Lords that ‘the much vaunted system of Criminal Records Bureau checks seems to have descended into farce and chaos’.¹¹²

There appeared to be no resolution to the now perennial problem of inaccurate CRB checks. In 2009 the CRB issued 1,570 erroneous certificates – either checks which showed convictions against applicants who had none or which declared a person free from convictions when they had in fact been so convicted.¹¹³ In 2010, one article noted that ‘the CRB has been criticised in the past for...mislabelling 2,700 people as criminals during checks’.¹¹⁴ In February 2011 the Information Commissioner was involved once more in criminal records after Gwent Police mistakenly sent 10,000 CRB checks by email to a journalist. Staff involved were disciplined and new internal procedures were drafted by response.¹¹⁵ In 2012 it was reported that a Freedom of Information (FOI) request had revealed that the total number of disputes to date which had successfully queried the accuracy of a disclosure was now 19,551 and that ‘in at least 3,000 cases the police record of an entirely different person was passed on while more than 3,500 people discovered their entries on the police national computer (PNC) were inaccurate’.¹¹⁶ A further FOI request later that year showed that in the previous five years, £1.9m had been paid in compensation to those adversely affected by an inaccurate disclosure.¹¹⁷

The deficiencies in the raw criminal data, known and lamented for nearly twenty years prior, were such that it was almost inevitable that mistakes would be made and, indeed, mistakes were made. These errors caused public and political confidence in the CRB to erode its inception.

In one significant respect, the criticism was misdirected. The CRB were never the legal custodian of the criminal records. They were merely the agency authorised to access the PNC and disseminate checks. The records are the property of the Police,¹¹⁸ and the responsibility for the unsatisfactory state of the data must, therefore, lie solely with the applicable police forces. It is perhaps fortunate for them that the blame was largely laid almost entirely with the CRB,

¹⁰⁹ HC Deb 6 November 2008 c.636W

¹¹⁰ Ibid. at c.637W

¹¹¹ H. Hart, ‘Checking Up’ (15 February 2008) 158 NLJ 237

¹¹² HL Deb 17 July 2008 c.1324

¹¹³ UK criminal vetting errors double (3 August 2009) The BBC

¹¹⁴ L. Pullan, ‘Criminal record checks’, (1 February 2010) Pay and Benefits 44 at 45

¹¹⁵ R. Huseyin, ‘News and Views – 10,000 CRB checks go to wrong recipient’, (1 March 2011) PDP 11 6 (16) at 18

¹¹⁶ T. Whitehead, Thousands wrongly labelled as criminals (2 February 2012) The Telegraph

¹¹⁷ Criminal records wrongly name 12,000 people (28 December 2012) The Guardian

¹¹⁸ C. Baldwin, Necessary Intrusion or Criminalising the Innocent? An exploration of Modern Criminal Vetting (2012) 76(2) J. Cr. L. 140 at 143

and unfortunate for the CRB that they found themselves publicly scapegoated for the failings of the Police.

However, it is submitted that the responsibility for making the demarcation clear lay with the CRB, and they rarely made the case with sufficient force as to mitigate the errors made. Indeed, in the main they instead they chose to take a bright-line approach of ‘caution’ where ambiguity arose and defended the thousands of errors made on that basis.

This was a grave misjudgement. By taking such an approach they allowed the press to lead with headlines which showed the CRB in the worst possible light, referring to ‘blunders’ and ‘criminalising innocent people’. The Bureau may have been able to survive this had they been in a position of relative strength, but against a backdrop of several years of negative press regarding delays and increasing costs, the CRB position appeared remarkably arrogant and wholly misaligned.

This mistake was seized upon by the media, who took the opportunity to report copiously the many personal stories of individuals who found themselves wrongly tarred with criminality. This allowed an extremely destructive narrative to build whereby (sometimes excusable) errors became catastrophic mistakes, ruining the lives of innocent people. This inevitably caused significant reputational damage to the CRB and, as the reported number of affected persons rose, the narrative and subsequent damage increased to almost unmanageable levels.

Ultimately, the CRB retreated behind bare statistics to defend themselves against charges of criminalising innocent people. The criminalisation of one innocent individual is wrong. To criminalise thousands is reprehensible. It is submitted that defending such a charge on the grounds of ‘caution’ caused fatal damage to the reputation of the Bureau.

The Disclosure and Barring Service

In March 2012, the CRB reached its tenth birthday. It did not reach an eleventh. As part of their commitment to reforming criminal records procedures, the coalition Government introduced the Protection of Freedoms Bill¹¹⁹ into Parliament in February 2011. An amendment was made to that Bill so that by May 2011 it included provisions for the creation of a ‘Disclosure and Barring Service’ (‘the DBS’),¹²⁰ whose function would include the transfer of all roles undertaken by the Independent Safeguarding Authority.¹²¹ The Bill also provided that the Home Secretary may enact delegated legislation to transfer the functions of the CRB to the DBS if s/he wished.¹²² The Bill received Royal Assent on 1 May 2012.

The Government had a decision to make. It’s 10-year contract for the CRB with Capita was almost expired and due for reconsideration. On 3 October 2012, Capita announced that it would

¹¹⁹ Per s.84 HC Bill 146 2010 – 11

¹²⁰ HC Bill 189 2010 – 12 (as amended)

¹²¹ Ibid. at s.84

¹²² Ibid. at s.85

not be granted a new contract.¹²³ On 29 November 2012 the Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012 was approved by Parliament. Coming into force on 1 December 2012, this order dissolved the ISA and transferred its entire jurisdiction to the DBS¹²⁴ and, by Part 3. Chapter 1, also transferred all CRB obligations under Part V of the Police Act 1997 to the DBS.¹²⁵ The DBS, a non-departmental public body, opened on 1 December 2012¹²⁶ and is now ‘the main agency... carrying out employment vetting by reference to criminal records’.¹²⁷ The contract lost by Capita was ultimately awarded to Tata Consultancy Services, who formally took over from Capita on 12 March 2014.¹²⁸

Conclusions

By January 2013 the Criminal Records Bureau had been closed. Since its inception it had conducted over 21 million criminal record checks.¹²⁹ It’s demise was not lamented: in January 2013 Thomas commented ‘So, farewell then, Criminal Records Bureau and your ubiquitous CRB checks’.¹³⁰

Why did the Government choose to close the Criminal Records Bureau? The question is an important one in the modern vetting narrative; firstly due to the critical importance that the CRB has played in the development of the vetting epidemic in England and Wales, and secondly because there was no immediate rationale for closing it down – certainly there was no pressing reason why the ISA couldn’t have been merged into the CRB or why the CRB couldn’t have continued under a different operator once the contract with Capita had expired.

It is clear, with the benefit of hindsight, that the CRB was not ready to ‘go live’ and therefore should not have opened in March 2002. The deficiencies of the raw data should have resulted in a postponement until they were rectified. It opened because there was tremendous pressure for it to do so. The Police Act had passed into law in 1997 and since that time there had built a significant political groundswell in favour of opening and for vetting generally. By 2001 the position at Westminster was that ‘those working with children or vulnerable adults will need to obtain a certificate showing that they have no criminal record’.¹³¹ This political objective could not be achieved until the CRB was opened and, with the start date already postponed from July 2001 due to concerns over the data quality, political patience was beginning to wear thin.

¹²³ N. Fletcher, Outsourcing group Capita loses out as Home Office picks new supplier for key service (3 October 2012) *The Guardian*

¹²⁴ s.2 Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012

¹²⁵ ss36-47 Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012

¹²⁶ E. Booth, ‘Overview of the week – Criminal Record Checks’ (8 December 2012) 176 JPN 727 at 728

¹²⁷ T. Thomas, ‘A cautionary tale’ (16 February 2013) 177 JPN 98

¹²⁸ Disclosure and Barring Service – Annual accounts and reports 2014/15 HC309 (16 July 2015) 15

¹²⁹ Criminal Records Bureau – Annual Report and Accounts for the period 1 April 2012 to 1 December 2012 HC66 (20 May 2013) 14

¹³⁰ T. Thomas, ‘A Cautionary Tale’ (16 February 2013) 177 JPN 98

¹³¹ Select Committee on Home Affairs, Second Report – Criminal Records Bureau HC 227 (2000 – 1) at para.1

Capita was also under pressure from employers and voluntary groups. The expansion of vetting proposed under Part V of the Police Act 1997 had been supported vociferously by employers and particularly charitable organisations, many of who had been lobbying for access to criminal records since the late 1980's.¹³² By 2002, with the prospect of free access to certificates in the offing, charities particularly were putting considerable pressure on the Government and on Capita to start issuing checks, while the position of employers was that 'most employers would like to know if their staff or prospective staff have criminal records'.¹³³ Moreover, by the end of February 2002, in accordance with agreed protocol, the Police had stopped processing applications for criminal record checks.¹³⁴ It is not surprising, therefore, that Capita opened the CRB before it was properly ready to do so.

Having opened before it should, the CRB then found itself engulfed in controversy. At least a proportion of this was of its own making. Although it was unfortunate that the *Soham* murder led to a flurry of applications, the fundamental errors made in its operational assumptions meant it was wholly unprepared for the backlog of applications which arose at a time when delay was unacceptable to the public, the press and Westminster. The incident damaged its standing in its infancy, and it is arguable that the Bureau never really recovered.

With its reputation damaged, the Bureau then embarked on a drive towards self-sufficiency which led to significant price increases and payments from the Government to cover budget deficits. These were played upon by politicians and the press, who used the earlier backlog issues as justification for further attacks which, although somewhat superficial, further negatively impacted the public perception of the CRB and reinforced the presumption that the Bureau was 'in crisis'.

Although the Bureau achieved its self-funding aims and stabilised costs, it continued to face criticism for errors made on certificates issued. The fault for those errors lay predominantly with the Police, who maintained the raw criminal record data, but the CRB failed to make this demarcation clear and instead justified the errors on the basis that they were a tiny proportion of the overall vetting volume and that caution was preferred in ambiguous cases. This laid the Bureau open to the grievous charge of criminalising innocent people and stories emerged of individuals whose lives were ruined by inaccurate disclosures.

When faced with the opportunity to dispose of the Criminal Records Bureau, the Government chose to do so when it had no pressing legal or operational need to do so. Perhaps the Home Office formed the view that the 'CRB brand' had become toxic and should be consigned to history. It would be hard to disagree: in light of the negativity which had enveloped it and helped to undermine its important work since its operations commenced, the decision was perhaps an understandable one. Will Tata and the Disclosure and Barring Service avoid making the mistakes that led to its predecessor's demise? Time will tell.

¹³² T. Thomas, 'Employment Screening and the Criminal Records Bureau' (2002) 31(1) ILJ 55 – 70 at 61

¹³³ C. De La Mare and K. Sandison, 'Criminal Convictions', (1 May 2001) Employment Law Newsletter 81

¹³⁴ Above n.49 at 24