RESEARCH PAPER 06/35
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The *Safeguarding Vulnerable Groups Bill [HL]*

Bill No 194 of 2005-06

The Bill, which is due to be debated on second reading on 19 June 2006, aims to establish an Independent Barring Board (IBB) that will be responsible, with the support of the Criminal Records Bureau (CRB), for maintaining two lists of individuals barred from working with children or vulnerable adults. The Bill also seeks to create a new Vetting and Barring Scheme under which individuals who wish to engage in certain types of activity with children or vulnerable adults will have to apply to be subject to monitoring by the Secretary of State. There will no longer be any ministerial role in deciding whether particular individuals should be barred from working with children or vulnerable adults. Inclusion on the new lists will take place on a case-by-case basis with provision for automatic inclusion in respect of individuals who have been convicted of certain offences to be specified in regulations.

The Bill extends to England and Wales. Other than provisions for the supply of information from the IBB and the Secretary of State to professional bodies, it does not extend to Scotland. Some provisions apply directly to Northern Ireland with the remainder to be implemented through an Order in Council.

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Summary of main points

People who seek to work with children or vulnerable adults are currently vetted through a system that involves employers applying to the Criminal Records Bureau (CRB) for disclosures about new job applicants, under arrangements set out in the *Police Act 1997*. CRB disclosures include information from police databases and local police records about the individual's criminal record and may also include other information held by the police about the individual. Government departments also maintain three separate lists of people who are barred, for a wide variety of reasons, from working with children or vulnerable adults. These lists, which each have different criteria and procedures, are: List 99; the Protection of Children Act (POCA) List; and the Protection of Vulnerable Adults (POVA) List.

The Bichard Inquiry report, published in 2004, identified systemic failures in the current vetting and barring systems and recommended that a central body be established to administer a new register of those who wish to work with children. The *Safeguarding Vulnerable Groups Bill* is intended to implement the Government's response to this recommendation. Prior to its introduction in the House of Lords there were further concerns about reports that individuals with convictions for sexual offences who had not been included on List 99 and had been working in schools.

This paper sets out the immediate background to the introduction of the Bill and considers some of the principal features of the new Vetting and Barring Scheme which it seeks to create. In very general terms it could be argued that the new Scheme resembles a form of licensing of those who can be permitted to engage in certain activities with children and vulnerable adults.

The Bill, which was introduced in the House of Lords and has now been passed to the Commons where it is due to be debated on second reading on 19 June 2006, has been broadly welcomed. It aims to create a list of individuals who are barred from working with children and a separate but aligned list of individuals who are barred from working with vulnerable adults. Responsibility for maintaining these lists and making decisions about whether individuals should be included in the lists will rest, not with ministers, but with an Independent Barring Board (IBB) created by the Bill.

The Bill is particularly concerned with two general categories of activity involving children and vulnerable adults which are expressed as "regulated activities" and "controlled activities". "Regulated activities" broadly cover close contact work with children, work in settings such as schools and care homes and key positions of responsibility, such as the director of adult social services. "Controlled activities" will cover ancillary work in education and health settings such as cleaning, catering and administration.

A person will be able to apply to be subject to monitoring by the Secretary of State in respect of regulated activity involving children or adults or both. Where a person is subject to monitoring the Secretary of State will obtain details of any convictions, cautions they may have and any other relevant information held by police forces and this will be passed to the Independent Barring Board for its purposes. Details of those individuals who are subject to monitoring will be held by the Secretary of State, possibly on a secure website. With a number of exceptions, only those individuals who are subject to monitoring will be permitted to engage in regulated activities. Monitoring will be an ongoing process enabling new information about individuals to be passed to the IBB.

The police will be under a duty to provide relevant information for monitoring purposes. Employers, local authorities, professional and regulatory bodies and others will be under a duty to refer prescribed information to the IBB in certain circumstances and to provide such information if requested to do so by the IBB. Measures to encourage the sharing of

information between these different groups and the IBB are a key feature of the new system created by the Bill

The provisions in the Bill are backed up by criminal offences which are intended to:

- prevent barred individuals from engaging in regulated activity with children or vulnerable adults
- ensure that people permitted to engage in regulated activity with children or vulnerable adults are subject to monitoring
- ensure that relevant employers check whether an individual is barred or is subject to monitoring before engaging an individual in a regulated activity with children or vulnerable adults

The Government has emphasised that it does not wish to interfere with private family arrangements. Carers in close family relationships will not be subject to mandatory checking. People at an increased risk of abuse will be able to use the central vetting process in respect of individuals providing this support. However, in many cases, assistance to a vulnerable adult will be given by family members or trusted friends and the Government does not consider it appropriate to impose mandatory requirements on them.

The first part of this paper is concerned with the Bill itself while the remainder includes discussion of a number of areas of policy and practice that form part of the background to the issues raised by the Bill.

CONTENTS

I The *Safeguarding Vulnerable Groups Bill [HL]*

A. Background

People who seek to work with children or vulnerable adults are currently vetted through a system that involves employers applying to the Criminal Records Bureau (CRB) for disclosures about new job applicants, under arrangements set out in the *Police Act 1997*. CRB disclosures include information from police databases and local police records about the individual's criminal record and may also include other information held by the police about the individual.

There are also three separate lists, kept by the Department for Education and Skills and the Department of Health respectively, of people who are barred from working with children or, as the case may be, vulnerable adults. These lists, which have separate statutory derivation and different criteria and procedures, are List 99 (maintained under section 142 of the *Education Act 2002*); the Protection of Children Act (POCA) List (maintained under the *Protection of Children Act 1999*) and the Protection of Vulnerable Adults (POVA) List (maintained under Part 7 of the *Care Standards Act 2000*). Individuals may be included on these lists for a much wider variety of reasons than the fact of their having a criminal record.

1. The Bichard enquiry (Soham murders)

Ian Huntley was convicted at the Old Bailey on 17 December 2003 of the murder of Holly Wells and Jessica Chapman. Maxine Carr was found guilty of conspiring to pervert the course of justice. On 18 December 2003, the Home Secretary announced the launch of an independent inquiry into the manner in which the police had handled intelligence about Ian Huntley's past and about the vetting processes which ultimately led to his employment in a local school.

Sir Michael Bichard, Rector of the London Institute and a former Permanent Secretary at the Department for Education and Employment, was appointed as Chairman of the inquiry. The Bichard Inquiry report was published on 22 June 2004[1] and recorded serious systemic failures in police handling of intelligence information and in current vetting and barring systems. In relation to the Criminal Records Bureau, the chairman's press statement summarised the findings and recommendations as follows:

> In spite of its initial problems I am clear that the CRB has improved significantly the administration of this important function. However, I am equally clear that there are still problems. These include:
>
> - The lack of clear criteria for deciding the level of check required;
> - the reliability of identity checks;
> - the extent to which previous addresses are or should be verified;
> - the precise responsibility of the registered bodies through whom the checks are made;

[1] *The Bichard Inquiry Report* HC 653 22 June 2004

- the thoroughness of checks on the increasing numbers of overseas workers; and
- the failure at present to access relevant non-police data (for example, Customs and Excise).

I have, therefore, made recommendations to address each of these including that all posts, in schools, should be subject to the enhanced disclosure requirement. But I have also concluded that even with these further improvements there will continue to be overlaps, inconsistencies and duplications with systems such as List 99 (used in Schools), POCA (Protection of Children Act List) and POVA (Protection of Vulnerable Adults List). I am, therefore, proposing that we introduce over a phased period a new registration system which employers could access and which would reassure them that nothing was known about a particular individual which would disqualify them from working with children and vulnerable adults. From next year such a system could be routinely updated with recent convictions and new intelligence whereas under the existing arrangements there is no reliable way of ensuring that subsequent convictions or intelligence is made available to employers. The new system could also provide an opportunity for applicants to appeal before third parties are informed of any refusal to register. My preliminary discussions with Government Departments have been encouraging and I am told that such a scheme could even produce cost savings. Whether or not it is supported by a card or licence is for others to decide.[2]

The report's recommendation that a central body be established to administer a new register of those who wish to work with children (Recommendation 19) is set out in full below:

New arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered. This register – perhaps supported by a card or licence – would confirm that there is no known reason why an individual should not work with these client groups.

The new register would be administered by a central body, which would take the decision, subject to published criteria, to approve or refuse registration on the basis of all the information made available to them by the police and other agencies.

The responsibility for judging the relevance of police intelligence in deciding a person's suitability would lie with the central body. The police, as now, would be able to identify intelligence which on no account should be disclosed to the applicant.

Employers should still decide, based on good selection procedures, whether or not the job required the postholder to be registered and should retain the ultimate decision as to whether or not to employ.

The central body would have the discretion to ignore any conviction information judged not to be relevant to the position in question.

Individuals should have a right to appeal against any refusal to place them on the register and that right should be exercised before any information is made available to a third party.

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[2] http://web.archive.org/web/20070212163446/http://www.bichardinquiry.org.uk/cagetfile.asp?rid=180

> The register should be continuously updated and available to prospective employers for checking online or by telephone.
>
> The register should be introduced in a phased way, over a period of years, to avoid the problems associated with the introduction of the Criminal Records Bureau (CRB).
>
> The DfES, in consultation with other government departments, should decide whether the registration scheme should be evidenced by a licence or card.

The Home Office's third progress report on the *Bichard Inquiry Recommendations* says of the action planned in response to this recommendation that it remains a "substantial and complex strand of work".[3] The *Safeguarding Vulnerable Groups Bill* is designed to provide the legislative basis for its implementation.

2. Recent concerns about sex offenders working in schools

Reports in January of this year that a number of men with criminal records for sexual offences involving young people were working in schools renewed concerns about the vetting and barring of people seeking to work with children. Following initial reports the then Secretary of State for Education and Skills, Ruth Kelly, made a number of statements to the House of Commons in which she announced a review of the List 99 decision-making process, and set out what the Government intended to do to improve arrangements for vetting those working with children and barring those who are unsuitable.[4] The Secretary of State subsequently made a written statement outlining progress on 1 March 2006.[5] The Minister for Children, Young People and Families, Beverley Hughes, also made a written statement on 9 March 2006 about safeguarding in early years and childcare in which she made a number of comments about the *Safeguarding Vulnerable Groups Bill,* which had been introduced in the House of Lords a few days before.[6]

The measures taken by the government in response to public concerns are summarised in the Home Office's third progress report on the *Bichard Inquiry Recommendations*:

> In response to public concerns regarding the issue of child protection in school, the DfES undertook an urgent review of the List 99 decision making process in January 2006. Announcing the conclusions of the review, the Secretary of State set out a series of immediate and medium-term reforms to improve the current safeguarding system. These reforms included:
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> - proposals to bar from working with children in education services all those who are now convicted or cautioned for sexual offences against children, as well as for a range of other serious sexual offences against adults – amendments to List 99 regulations will be taken forward later this year;

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3 Home Office, *Bichard Inquiry Recommendations: Third Progress Report* May 2006 p.41

4 HC Debates 11 Jan 2006 c10WS; HC Debates 12 January 2006 c435-436; HC Debates 19 January 2006 c966-970

5 HC Debates 1 March 2006 c21-25WS

6 HC Debates 9 March 2006 c72-74WS

- improving the rigour of on-appointment checks on the school workforce by introducing regulations to make CRB checks compulsory for all new appointments, with similar regulations to apply to further education institutions – regulations affecting the schools workforce came into effect on 12 May 2006;
- an Ofsted investigation of the robustness of on-appointment procedures in schools – the report of this investigation was published in May 2006;
- the establishment of an expert panel, chaired by Sir Roger Singleton, as an interim measure, to make recommendations to the Secretary of State in respect of List 99 decisions – the full panel is now in place; and
- the establishment of an Independent Barring Board which will have responsibility for all discretionary barring decisions under the planned new system – this is being taken forward through the Safeguarding Vulnerable Groups Bill.[7]

Under the Safeguarding Vulnerable Groups Bill employers will be required to check an individual's status in the scheme . The requirement will apply to individuals who have frequent contact with children in key settings such as schools. This is defined as engaging in 'regulated activity.' Barred people will not be permitted to engage in a regulated activity (paid or unpaid) and employers will be required to check new recruits'status in the scheme.

On 6 April 2006 the Department for Education and Skills (DFES) published a new version of *Working Together to Safeguard Children*, its guidance for local authorities and other agencies with responsibilities for the welfare of children. The guidance, which is designed to implement two further recommendations of the Bichard Inquiry (Recommendations 12 and 13), is available on the internet.[8] It aims to enhance the protection of children and young people by improving joint working practices, including the sharing of information between the police and other agencies.

3. Consultation

The Department for Education and Skills consultation following the Bichard Inquiry was entitled *Making Safeguarding Everybody's Business: A Post-Bichard Vetting Scheme*, and was published on 5 April 2005.[9] The Government proposed a new vetting and barring scheme for people seeking work, whether paid or unpaid, with children or vulnerable adults:

> 1.2 The proposed scheme will build on the existing barring lists and Criminal Records Bureau services in order to provide a comprehensive, centralised, integrated and updated system to prevent unsuitable people from gaining access to vulnerable groups through their work and to ensure that those who become unsuitable do not continue in the workforce. A check of an applicant's barred

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7 Home Office, *Bichard Inquiry Recommendations: Third Progress Report* May 2006 p.42

8 http://collections.europarchive.org/tna/20090423095546/http://www.everychildmatters.gov.uk/_files/CCE39E361D6AD840F7EAC9DA47A3D2C8.pdf

9 DfES, *Making Safeguarding Everybody's Business: A Post-Bichard Vetting Scheme*, 5 April 2005

> status would be readily accessible to employers and to those employing carers under private arrangements, including parents.
>
> 1.3 It is intended that the scheme could begin operating by 2007 with interim improvements to current vetting and barring arrangements before that.

The consultation focussed on recommendation 19 of the Bichard Inquiry and summarised the main concerns as follows:

> 2.3.2 Decisions on who is or is not unsuitable are taken locally, often by small employers who have relatively little experience of handling raw information about offences and allegations. Not all staff in child or vulnerable adult-related settings are eligible for an Enhanced Disclosure because workers need to have regular unsupervised contact with children or vulnerable adults to require one. The quality and relevance of soft information obtained from local police forces is variable and the disclosure certificate is only valid on the day of issue – it is not subject to updating.
>
> 2.3.3 The current vetting system is backed up by three separate barring lists operating under different legislation with different criteria and procedures: List 99 (the list of directions made under Section 142 of the Education Act 2002), Protection of Children Act List (POCA) and the Protection of Vulnerable Adults List (POVA). The barred lists are reactive (individuals are only considered for barring after harming, or placing at risk of harm, a child or vulnerable adult, or in the case of List 99 for professional misconduct issues as well) and only certain types of employers have a duty, or even a right, to refer employees whom they dismiss for harming a child or vulnerable adult to the barring lists.
>
> 2.3.4 In addition, work is being taken forward within Government to increase the scope of Enhanced Disclosures. This is in order to (a) ensure that all those who work with children or vulnerable adults are eligible for a disclosure at the enhanced rather than the standard level, and (b) extend the provisions of the Rehabilitation of Offenders (Exceptions) Order to include those who have indirect contact with children or vulnerable adults via the phone (for example, Childline counsellors or NHS Direct staff) or internet (for example, children's chat room moderators) and those who have substantial access to personal and sensitive information about children or vulnerable adults (such as those who operate databases of Social Services information).

The way the scheme will work in practice was set out as follows:

> 3.3.2 An application for an Enhanced Disclosure through the CRB would be the starting point for entry into the system. In those cases where information is revealed by a search, all potentially relevant information will be passed on to a central expert team to consider whether an individual should be barred from working with children or vulnerable adults. It will then be up to the expert teams in the scheme to decide on the relevance and seriousness of the information received and to make a decision as to whether that person is unsuitable to work with children and/or vulnerable adults. System improvements should speed up the process but this proactive barring assessment may delay the issuing of the Disclosure in the very small number of cases where an assessment needs to be made

3.3.3 Even where the initial search reveals no information, the fact that an Enhanced Disclosure has been carried out for work with children/vulnerable adults will be recorded by the CRB system. This will effectively be the equivalent of registration, since the record will be flagged so that any new information that subsequently arrives relating to a flagged individual will automatically be passed on to the barring scheme. This continuous updating will allow the barring decision to be kept under review.

3.3.4 Referrals will be received, as now, from employers when an individual's employment is terminated as a result of reasons associated with harm, or risk of harm, to children or vulnerable adults. It is intended that the range of employers and other bodies able to make referrals will be extended. The new barring scheme, supported by improved IT systems, will deal with these referrals using streamlined processes.

3.3.5 Where a decision is made to bar an individual on the basis of new information, for example from the police or from a referral, the employer or parent will be notified. The precise mechanism for doing this is currently being explored but the possibility of using the electronic audit trail provided by employers and parents undertaking online checks against the barred lists is being considered.

3.3.6 Whether or not an employer undertakes a CRB check on an applicant will depend on the nature of the job applied for. As is currently the case, there will be certain positions and situations where a check is mandatory while in others it will be up to the employer's discretion whether or not a check is necessary.

3.3.7 If an individual is new to the workforce they will need to get an Enhanced Disclosure from the CRB as this is the entry route into the new vetting scheme. On subsequent changes of job or position (where a check is desired or mandatory) the legal requirement on employers will be a check against the barred lists only.

3.3.8 Access to the barred lists will be available to all employers with a legitimate interest – this will include personal employers such as parents and those employing carers for vulnerable adults. Access to the barred lists will possibly be provided via the e-government gateway. In the case of small-scale and personal employers and parents, access may need to be mediated via a CRB Registered Body where e-government gateway access is not available.

3.3.9 An individual's barred status – that is, barred, not barred or under consideration – will be provided following entry of the individual's personal details, their CRB disclosure number and a security password. The act of checking an individual against the barred lists will enter that employer into the audit trail for notification of future changes to the individual's barred status.

The consultation raised questions on the following topics:

- positive impact in terms of improving safeguards
- negative impact on recruitment for work with children or vulnerable adults
- timeframe for initial Disclosures in terms of effective recruitment practices
- scope of child-related employment
- scope of vulnerable adult-related employment
- impact of the increase in compulsory checks
- secure online checking facility

- costs and benefits to employers
- funding arrangements
- employers discretion to check workers who come into contact with employed children or vulnerable colleagues
- existing penalties for non-compliance
- threshold for barring
- position of individuals with relevant offences or allegations and if they should be put be 'under review' or be 'provisionally listed'
- information from professional and regulatory bodies in terms of possible delays
- referrals from social services
- consequences for the children and vulnerable adults' workforce

The consultation outcome was published on 4 November 2005.[10] This reported that the proposals were welcomed although there were concerns about delays and costs. Respondents supported a general timeframe of two weeks with a maximum of four weeks and felt that all who had access to children and vulnerable adults should be checked, with those with relevant offences or allegations being provisionally listed. The idea of a secure online facility was supported. Information from professional and regulatory bodies and referrals from social services should be accepted.

B. The *Safeguarding Vulnerable Groups Bill 2005-06* [HL] [Bill 194]

This part of this Research Paper considers some of the principal features of the *Safeguarding Vulnerable Groups Bill 2005-06*. The remainder of the paper is concerned with discussion of a number of related issues which form part of the background to the introduction of the Bill.

The *Safeguarding Vulnerable Groups Bill* was announced in the Queen's Speech of 17 May 2005. The press notice which accompanied the Speech said:

> The Safeguarding Vulnerable Groups Bill would respond to a key recommendation made by the Bichard inquiry for a "registration scheme" to prevent those who are deemed to be unsuitable from gaining access to children or vulnerable adults through their work. The Department for Education and Skills and Department of Health are currently consulting on the establishment of a vetting and barring scheme for England and Wales.
>
> The proposed scheme, which would begin operation by 2007, would:
>
> - Introduce centralised, integrated pre-employment vetting and draw on wider sources of information (such as employers and regulators, as well as the police, courts and social services), providing a more comprehensive and consistent measure of protection for vulnerable groups.
>
> - Build on the existing pre-employment checks available through the Criminal Records Bureau, the Protection of Vulnerable Adults scheme,

[10] Department of Health, *Making Safeguarding Everybody's Business: A Post-Bichard Vetting Scheme, Analysis of the responses to the Consultation document*, Gateway reference: 5553, 4 November 2005:

the Protection of Children Act scheme and List 99 for the education sector.

- Be constantly updated to ensure that those who become unsuitable do not continue in the workforce.
- Allow employers to make a simple online check of an applicant's barred status.
- Extend the compulsory requirements for checks to new groups (subject to consultation); and:
- Notify employers immediately if someone they are employing becomes barred.

The bill would make provisions to cover England and Wales. There would also be clear links with Scotland and Northern Ireland.

The Bill was introduced in the House of Lords on 28 February 2006. The *Explanatory Notes* set out the following factors as problems with the current vetting and barring systems identified by the Bichard Inquiry report:

- inconsistent decisions were being made by employers on the basis of CRB disclosure information
- CRB disclosure information is only valid on the day of issue
- there are inconsistencies between the List 99, the POCA list and POVA list
- the current barring system is reactive to harmful behaviour rather than preventative
- there are inconsistencies in police disclosure of information between police authorities[11]

In very general terms it could be argued that the new vetting and barring scheme resembles a form of licensing of those who can be permitted to engage in certain activities with children and vulnerable adults.

The Bill aims to create a list of individuals who are barred from working with children and a separate but aligned list of individuals who are barred from working with vulnerable adults. Responsibility for maintaining these lists and making decisions about whether individuals should be included in the lists will rest, not with ministers, but with an Independent Barring Board (IBB) created by the Bill.

The Bill is particularly concerned with two general categories of activity involving children and vulnerable adults which are expressed as “regulated activities” and “controlled activities”. “Regulated activities” broadly cover close contact work with children, work in settings such as schools and care homes and key positions of responsibility, such as the director of adult social services. “Controlled activities” will cover ancillary work in education and health settings such as cleaning, catering and administration.

[11] *Explanatory Notes* paragraph 5

A person will be able to apply to be subject to monitoring by the Secretary of State in respect of regulated activity involving children or adults or both. Where a person is subject to monitoring the Secretary of State will obtain details of any convictions, cautions they may have and any other relevant information held by police forces and this will be passed to the Independent Barring Board for its purposes. Details of those individuals who are subject to monitoring will be held by the Secretary of State, possibly on a secure website.[12]

With a number of exceptions, only those individuals who are subject to monitoring will be permitted to engage in regulated activities. Monitoring will be an ongoing process enabling new information about individuals to be passed to the IBB.

The police will be under a duty to provide relevant information for monitoring purposes. Employers, local authorities, professional and regulatory bodies and others will be under a duty to refer prescribed information to the IBB in certain circumstances and to provide such information if requested to do so by the IBB.

The Bill creates a number of new criminal offences which are intended to:

- prevent barred individuals from engaging in regulated activity with children or vulnerable adults
- ensure that people permitted to engage in regulated activity with children or vulnerable adults are subject to monitoring
- ensure that relevant employers check whether an individual is barred or is subject to monitoring before engaging an individual in a regulated activity with children or vulnerable adults

The Government published a number of information notes on the policy behind different aspects of the Bill and the regulation making powers in it before the Bill's committee stage in the House of Lords. These notes were deposited in the Library.[13]

1. The Independent Barring Board (IBB)

The Bill provides for the creation of the Independent Barring Board, which will maintain ivdesAt Report Stage in the Lords, Lord Adonis gave further information about the practical arrangements for the IBB:

> The IBB will have a chairman and members. We expect its executive to have a total of about 10 members. It will be able to appoint members of staff to enable it to carry out its core functions of deciding whether to include an individual on a list, determining whether to remove someone from a list, and considering representations. Its other functions may be delegated. We expect that much of the administrative work will be done by the Criminal Records Bureau, and will build on the bureau's current expertise in data-handling. So the great bulk of the work, to which the noble Baroness referred, will be done by the CRB.
>
> We expect the IBB to employ about 100 staff in total—that is, over and above the number of members of the board. We also expect it to take approximately 20,000 decisions a year, and to bar about 25,000 people. I am told that the location of

[12] Source: DfES official
[13] Deposited Paper 06/860

> the IBB is unknown at the moment, but I will let the noble Baroness know what the options are as and when we have them. We expect the cost of the IBB to be in the region of £12 million to £15 million, over and above the existing costs of the Criminal Records Bureau.[14]

Schedule 2 to the Bill outlines the functions of the IBB in the new Vetting and Barring Scheme. The Secretary of State is given the power to make regulations which provide for the procedure which the IBB must follow when making a decision specified in Schedule 2, including the times within which anything is to be done. The IBB's core functions, which cannot be delegated, are given in Schedule 1 paragraph 8:

- determining whether it is appropriate for a person to be included in a barred list;
- determining whether to remove someone from a barred list; and
- considering representations made for the purposes of Schedule 2.

The IBB will have other functions which it will be able to delegate. For example, much of the administrative support needed will be provided by the CRB.

As regards costs the following expectations were outlined:

> The DfES and the Department of Health will provide upfront investment of nearly £17 million in 2007-8 for the setting up of the new centralised vetting and barring processes. The annual operating costs of the new scheme are expected to be in the range of £16 million a year over the first five years of the scheme starting in 2008-9. That is additional to the cost of the existing CRB disclosure and related processes which are about £83 million a year. CRB standard and enhanced disclosures currently cost £29 and £34 respectively. From 1 April, they will rise to £31 and £36. The costs will be containable.[15]

The Bill outlines two lists of barred individuals that the IBB will keep. One of these will relate to work with children and the other to work with vulnerable adults. The relationship between the two lists was the focus of some concerns in the Lords debates, in particular the question of overlap. Baroness Buscombe outlined these at Second Reading in the following terms:

> One significant area of concern that needs to be addressed is why there is a need for two separate lists, rather than one central point of reference. Should an individual who is barred from working with vulnerable adults reasonably be permitted to work with children and vice versa? I certainly would not feel comfortable knowing that an individual barred from working with my children was providing care to my parents.
>
> Research by the Ann Craft Trust has shown that one in five people who sexually abused older people had also sexually abused children. Abuse is about power, not age, and those people who abuse vulnerable adults will potentially abuse children, and vice versa.

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14 HL Deb 24 May 2006 c828
15 HL Deb 28 March 2006 c756

> Ultimately, there is a duty of care that must be provided to all vulnerable groups. It is telling that the Commissioner for Older People in Wales has been established along the same or similar lines and principles as the Children's Commissioner.
>
> We accept that there may be circumstances where individuals need only be placed on one of the lists. However, it would be irresponsible for the Independent Barring Board not to be duty bound to consider individuals who come before it for both lists. If there is a possibility that an individual poses a threat to the vulnerable, there is a real case that the IBB must be obliged to consider them for both lists. [16]

These concerns were supported in the course of other speeches.[17] Lord Adonis explained the reasoning behind separate lists:

> Although it is therefore appropriate to have two lists, where there is evidence of a risk to both vulnerable groups, the individual will be considered, as a matter of course, for inclusion in both lists. The independent barring board will consider this on a case-by-case basis. The two lists will also be aligned. The same processes will apply for both lists; they will both involve consideration of criminal records and information flows from professional and regulatory bodies, employers and local authorities. The broad criteria of risk and appeals processes will apply to both lists. There will be a high degree of co-ordination between them.[18]

Lord Rix tabled an amendment in Committee to merge two into a single list.[19] In rejecting the amendment, Lord Adonis set out further reasons why separate lists were considered appropriate:

> There is a high overlap between those who are entered on the Protection of Children Act list and those entered on the Protection of Vulnerable Adults list, but the other way round a sizeable proportion of those barred from the adult workforce are not barred from the children's workforce. I am informed that a significant reason for that concerns financial misconduct offences, which, it is not thought, should lead to—let us be clear what we are talking about—an absolute bar on working in the children's workforce.[20]

The Government have given the following indication of the coverage of regulations under Schedule 2 concerning the functioning of the IBB:

> *Decisions to include on a barred list, and the process of dealing with representations*
>
> The regulations that would be made under this paragraph in relation to determining whether to include an individual on a barred list could include:
>
> - the way in which the IBB will gather evidence, including representations by the individual;

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16 HL Deb 28 March 2006 c727
17 HL Deb 28 March 2006 Lord Laming c742; Baroness Morris c754
18 HL Deb 28 March 2006 c757
19 HL Deb 2 May 2006 c170 GC
20 HL Deb 2 May 2006 c176 GC

- the way in which the IBB will contact the individual giving the chance to make representations;
- the form in which representations must be made;
- the processes for verifying and considering the evidence and representations, including delegation to committees within the IBB;
- the times in which the IBB must complete certain stages of the process;
- the way that the IBB informs individuals of progress;
- the way that the IBB informs the individual of the decision whether to bar.

Reviews

The regulations that would be made under this paragraph in relation to reviews could include:

- the way that applications for leave to apply for a review should be made;
- the way that subsequent review applications should be made;
- the way that reviews will be considered by the IBB, including delegation to committees within the IBB;
- the times in which the IBB must complete certain stages of the process;
- the way that the IBB informs individuals of progress;
- the way that the IBB informs the individual of the decision whether to remove them from the list.

2. Levels of protection: regulated and controlled activities and non-compulsory checks

The Bill defines three different categories of activity where different levels of protection will apply. These levels of protection carry different degrees of discretion as regards employment in these activities.

a. Regulated activity

Lord Adonis outlined the various levels of protection when introducing the Bill at Second Reading in the Lords:

> The first level is where the bar applies and there is a requirement on employers to check barred status. It covers work in key settings such as schools or care homes, work that involves frequent and specified close contact with vulnerable groups in all adult health or social care or any children's settings, and key positions of authority. This is defined as "regulated activity" in the Bill and covers, for example, teachers and all other employees working in a school who have frequent contact with children. In those settings, barred people will not be allowed to work, and employers will be required to check whether recruits are barred. [21]

Regulated activity relating to work with children will be as follows:[22]

a) Certain types of close contact activity (specified in paragraph 2(1)) either:

- carried out frequently (e.g. teaching, caring for children)

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21 HL Deb 28 March 2006 c724-5

22 Paragraph 24, Explanatory Notes

- or carried out in an establishment specified in paragraph 3(1), such as school or a children's home, whether carried out frequently or infrequently.

b) Any activity carried out frequently in a specified establishment which gives a person the opportunity to have contact with children in pursuance of his duties there (such as a school secretary)

c) The provision of childminding where there is a requirement to be registered under the provisions of the Childcare Bill or there would be a requirement to be registered but for the fact that the individual does not provide childcare for a child below the age of eight (paragraph 1 (4)).

d) The inspection of specified establishments on behalf of the organisations specified in paragraph 1(7) and the inspection of generalist health establishments specified in sub-paragraphs (9) and (10) on behalf of the organisations specified in sub-paragraph (8).

e) The day-to-day management or supervision on a regular basis of any person carrying out the above (other than the provision of childminding).

f) The exercise of a function of the positions specified in paragraph 4(1) (e.g. school governor, children's commissioner, trustee of children's charity)

Regulated activity relating to work with adults will be as follows: [23]

a) Certain types of activity (specified in paragraph 5(1)) carried out frequently (e.g. teaching, caring for etc.), or carried out other than frequently in an establishment specified in paragraph 5(1), where that activity relates to vulnerable adults.

b) Any activity carried out frequently in connection with the purposes of a care home which gives a person the opportunity to have contact with vulnerable adults as a result of his duties or anything he is allowed to do there.

c) The day-to-day management or supervision or a regular basis of any person carrying out the above activities

d) The inspection of specified establishments on behalf of the organisations specified in paragraph 5(6)

e) The exercise of the functions of the position of a director of social services.

Clause 21 sets out various monitoring requirements that relate to regulated activity. Individuals will apply to become subject to monitoring by the Secretary of State in respect of regulated activity relating to children or vulnerable adults. The Secretary of State will obtain from police forces details of the monitored person's convictions and cautions and other relevant information and will be obliged to pass such relevant information to the IBB. It will be an offence for an individual to engage in regulated

[23] Paragraph 25, Explanatory Notes

activity unless they are subject to monitoring and employers will not be able to employ without monitoring being in place.

b. Controlled activity

Controlled activity was explained by Lord Adonis as follows:

> The second level of protection will involve a requirement to check barred status but with the discretion to employ, with appropriate safeguards put in place if necessary, should information of concern be secured by the employer such as, for example, from a full CRB disclosure or from a reference. The second level covers support work in general health, further education or social care settings. The Bill describes these more ancillary fields of employment as "controlled activity".[24]

Baroness Walmsley moved an amendment in response to requests from the NSPCC seeking to leave out the controlled activity category. This would have meant that there would only be regulated activity and that everyone who works with children in any capacity would be regulated.[25] The Government opposed the amendment:

> We believe that there are activities covered by this clause which should not be regulated activities preventing all individuals who are placed on the children's barred list engaging in them. It may be possible for some to be employed safely in these posts because they do not entail any close involvement with children or vulnerable adults. Earlier the noble Lord, Lord Laming, gave us examples of where that might apply. We could multiply those instances. For example, an individual may be on the barred list because she lost her temper and hit a child while teaching in a school, but there is no evidence that she would present a risk of harm to children if she was, say, a receptionist in a dental surgery, which would be covered as a controlled activity. A reasonable person assessing the situation would agree that there is a distinction between those two types of activity which, in fairness and justice, is one that deserves to be made in the legislation. It is not right simply to treat all these activities simply as regulated activities.[26]

c. Non-compulsory checks

Lord Adonis outlined the third level of protection as follows:

> The third level of protection is where there is the ability to check barred status but no requirement to do so. It covers work that involves specified close contact with children and vulnerable adults but where the employer is an individual making private family arrangements such as for nannies and care workers in the home. It also covers individuals working closely with vulnerable adults in a range of settings, including leisure facilities and supported housing. For the first time, parents will be able to check directly whether domestic employees are barred. [27]

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24 HL Deb 28 March 2006 c724-5
25 HL Deb 3 May 2006 c257-8 GC
26 HL Deb 3 May 2006 c259 GC
27 HL Deb 28 March 2006 c724-5

3. Regulated activity providers

Clause 6 defines a "regulated activity provider" for the purpose of the Bill. A regulated activity provider is a person with responsibility for the management or control of regulated activity, who makes arrangements for another person to engage in that activity. The Explanatory Notes to the Bill make clear that the clause is not restricted to an employer-employee relationship, but that it also covers volunteers. Individuals making private arrangements for their own benefit do not, however, fall within the clause 6 definition.

During the passage of the Bill through the Lords, Lord Rix expressed concern that the recipients of direct payments did not fall within the clause 6 definition:

> **Lord Rix:** At present under the Bill, the recipients of direct payments are not classified as regulated activity providers, which means that they do not have to check prospective employees against the list. Why should the employees of direct payment services be an unregulated workforce? Although it is important to ensure that it is as straightforward as possible for people to use the direct payment system, it is even more important to ensure that people on the adult barred list, who will not be able to find employment in most settings where they may have contact with vulnerable adults, do not gravitate to working for direct payment services instead, finding employment directly with vulnerable people who know absolutely nothing about their background. I am especially concerned about that because of the number of direct payment recipients who have a learning disability. It is vital that safeguards are in place to ensure that they are not exploited by abusers who, because of the regulations imposed across the rest of the care sector, cannot find work with vulnerable people elsewhere.[28]
>
> It may be safer to start with the assumption that people employed by the recipients of direct payments should be checked, and then to allow the recipients of direct payments to opt out of checking their employees.[29]

An amendment tabled by Baroness Walmsley, requiring direct payment users to check prospective employees against the list of barred people, was rejected,[30] with the Government spokesperson, Baroness Royall, arguing that "the purpose of direct payments was to put people in control of the care they received, so they should decide whether or not to check the list."[31]

The National Centre for Independent Living co-chair, Menghui Mulchandani argued:

> 'The whole point of direct payments is to give choice and control to people….The more barriers we put in front [of people], the more difficult we are making it for people to manage direct payments.'[32]

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28 HL Deb 28 March 2004 c740-1
29 *Ibid* c741
30 HL Deb 3 May 2006 GC224-228
31 *Community Care* magazine 11-17 May 2006
32 Quoted in *Community Care* magazine 27 April -3 May 2006

Patricia Grant, director of the Practitioner Alliance Against Abuse of Vulnerable Adults, accepted that unsuitable people would gravitate towards direct payment users. She, however, accepted that people may be employing family members or friends, and forcing them to carry out checks would not be right.[33]

The General Social Care Council has stated that it intends to consult on plans to register personal assistants employed directly by service users.[34]

4. Monitoring

a. Applying to be subject to monitoring

Under Clause 21 of the Bill people who wish to engage in regulated activity relating to children or vulnerable adults, and who have not been barred from engaging in the activity, will be able to apply to the Secretary of State to be made subject to monitoring. Applicants will have to apply in a prescribed form, satisfy certain identification requirements, pay the prescribed fees and specify whether their applications are being made in respect of regulated activity in relation to children or in relation to vulnerable adults.

Once a monitoring application has been made the Secretary of State will be under a duty to make enquiries about whether relevant information exists about the individual who has made the application and to request the person who holds the information to provide it to him.

"Relevant information" is

- The prescribed details of any convictions within the meaning of the *Rehabilitation of Offenders Act 1974* including spent convictions, and cautions;
- Information which the chief officer of a relevant police force thinks might be relevant in relation to the regulated activity concerned;
- Any other information which may be prescribed in regulations made by the Secretary of State.

Information provided to the Secretary of State for these purposes will have to be made available to the individual who has made the monitoring application, unless the Secretary of State thinks that it has already been provided to him, or it is information which the chief officer of the police force concerned thinks it would not be in the interests of the prevention or detection of crime to disclose to him. Any relevant information will also have to be passed to the IBB, which will use it in considering whether or not the individual should be barred.[35]

The Secretary of State will also have to ensure that subsequent enquiries are made at intervals he considers appropriate about whether any new relevant information exists

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33 *Ibid*

34 General Social Care Council media release, 16 February 2006.

35 Schedule 2(18)

about the individual concerned. Monitoring will thus be an ongoing process, rather than a process which is only carried out at the beginning of a person's involvement in a regulated activity.

The monitoring of an individual will end if the individual asks the Secretary of State to stop monitoring him and satisfies the Secretary of State that he is not engaged in the regulated activity concerned. The Secretary of State will also have discretionary powers to cease monitoring in prescribed circumstances.

As part of the current process of making enhanced disclosures, section 113B of the *Police Act 1997* permits the disclosure of information held by local police forces, in addition to information held centrally. Clause 23 of the Bill is intended to give statutory effect to the present monitoring arrangements concerning the disclosure of local police information by the Criminal records Bureau. It also provides for the appointment by the Secretary of State of an Independent Monitor charged with reviewing, reporting on and making recommendations for improvements in the disclosure by the police of information held locally. Clause 23(6) notes that the purpose of such a review is to ensure compliance with Article 8 of the European Convention on Human Rights, which is the right to respect for private and family life.

b. Offences relating to barred individuals and to monitoring

It will be an offence under Clause 7 for an individual to engage, seek to engage or offer to engage in regulated activity from which he is barred. It will also be an offence under Clause 9 for a regulated activity provider, personnel supplier or individual, who knows or has reason to believe that a particular person is barred from a regulated activity, to permit that person to engage in regulated activity from which he is barred (or to supply the person to a regulated activity provider in the case of a personnel supplier). These offences are punishable by up to five years' imprisonment and a fine.

Under Clause 8 of the Bill it will be an offence punishable by a fine of up to £5,000 for a person to

- Engage in regulated activity with the permission of a regulated activity provider if he is not subject to monitoring in relation to that activity;
- Engage in childminding activities which are regulated activities under Schedule 3, paragraph 1(4) if he is not subject to monitoring in respect of regulated activity relating to children; or
- Act as a governor of a school or maintained nursery school if he is not subject to monitoring in respect of regulated activity relating to children.

It will be a defence for a person charged with an offence under this Clause to prove that he did not know, and could not reasonably be expected to know, that he was subject to monitoring in relation to the activity.

No offence will be committed under Clause 8 by a person who is not subject to monitoring, who engages in regulated activity in a position or appointment made by a regulated activity provider before the commencement of this provision, or who continues to act as a school governor, having been appointed before the commencement of this provision, until such time as the Secretary if State specifies that an offence will be

committed in these circumstances. This is intended to enable the phasing in of the new vetting and barring arrangements where those people who are currently involved in activities which will become regulated activities under the provisions of the Bill are concerned. Similar provisions are made in respect of regulated activities in the NHS under Clause 15.

An exemption in Clause 8(9) is intended to ensure that parents and others who assist in schools on an occasional basis will not need to be subject to monitoring.

A person will not be committing an offence if he engages in a regulated activity relating to vulnerable adults, without being subject to monitoring, with the permission of a regulated activity provider who is exempted by Clause 14 from the requirement to make monitoring checks.

c. The requirement to make monitoring checks

It will be an offence under Clause 10 for a regulated activity provider to permit an individual to engage in regulated activity if he knows or has reason to believe that the individual is not subject to monitoring in relation to that activity. A personnel supplier who supplies an individual to a regulated activity provider in these circumstances will also be committing an offence. The offence will be punishable by a fine of up to £5,000. The Clause contains similar provisions to those in Clause 8 protecting those who come into schools on an occasional basis, pre-commencement positions and appointments, NHS employment and regulated activity which is exempted from the requirement to make monitoring checks under Clause 14.

Clause 11 seeks to make it an offence, punishable by a fine of up to £5,000, for a regulated activity provider to permit an individual to engage in regulated activity without making an "appropriate check" by obtaining "relevant information" relating to that individual. "Relevant information" is defined in Schedule 4 paragraph (4) and includes information on whether or not the individual is barred from the relevant regulated activity or is subject to monitoring in relation to it.

The regulated activity provider will be able to obtain "relevant information" by making an application for an enhanced criminal record certificate from the Criminal Records Bureau under section 113B of the *Police Act 1997,* or by making an application under Schedule 4 of the Bill, if the latter option is available to him. The Secretary of State will have powers under Clause 39 to disapply the application procedures under Schedule 4 in prescribed circumstances. Where this is the case, the only means of obtaining an "appropriate check" will be through an enhanced disclosure from the Criminal Records Bureau.

The regulated activity providers mentioned in Clause 14 and 15 are exempted from the requirement to make checks. Similar provisions to those in Clauses 8 and 10, to protect regulated activity providers in respect of parents and others coming into schools on an occasional basis and pre-commencement positions and appointments, are provided in relation to the offence under Clause 11. Where two regulated activity providers are permitting an individual to engage in the same regulated activity, one provider may rely on written confirmation from the other that it has made the appropriate check and has no reason to believe that the individual is barred or subject to monitoring.

Clause 13 is intended to enable a regulated activity provider who permits an individual supplied by a personnel supplier to engage in regulated activity (such as a supply teacher supplied to a school) to rely in certain circumstances on written confirmation obtained from the supplier that the supplier has made the appropriate checks and has no reason to believe that the individual's circumstances have changed. It will be an offence punishable by a fine of up to £5,000 for a personnel supplier to provide the written confirmation without having made the appropriate checks or to provide it after having learned that the individual has been barred or has ceased to be subject to monitoring since the checks were made.

d. Exceptions to the requirement to make monitoring checks

Clause 14 lists a number of regulated activity providers in relation to vulnerable adults who will be able to permit individuals who are not subject to monitoring to engage in regulated activities or supply such individuals to other regulated activity providers without committing the offence under clause 10. They will also be able to permit individuals to engage in regulated activity without having made the appropriate checks as required under Clause 11. Providers in relation to vulnerable adults will be exempted in this way if, amongst other things, they:

- provide complementary or alternative therapies;
- are responsible for the control or management of a prison or probation service
- are organizations providing recreational, social, sporting or educational activities
- provide prescribed courses of education or instruction
- are responsible for the control or management of the provisions of housing, including sheltered housing
- provide prescribed welfare services
- make arrangements for payments under section 57 of the Health and Social Care Act 2001 or the provision of services funded by such payments
- make arrangements for the appointment of people or the provision of services under powers of attorney and other powers relating to mental incapacity

The Secretary of State will have powers under Clause 14(4) to amend the list of exempted providers. Such an order will be subject to annulment under the negative procedure.

The Explanatory Notes comment that the Government is seeking to exempt the providers listed in Clause 14 from the requirement to make monitoring checks:

> Because there are some sectors where we wish to enable a check to be made, but do not wish to make them mandatory.

The exemption of certain providers from the requirement to make checks provoked some debate in the House of Lords and concern was expressed about several of the proposed exemptions. During the debate on the third reading of the Bill in the House of Lords the Government spokesperson for Health, Baroness Royall of Blaisdon, said the Government had listened to these concerns and would be making the following changes to the list of exempted providers:

The Government have listened to the concerns expressed and I will now set out the approach that we intend to take on this clause. Amendments will be brought forward in another place.

I turn, first, to subsection (1)(a) of this clause, which covers complementary and alternative medicine. We understand the particularly intimate nature of these services and are prepared to move on this issue. We will therefore bring forward an amendment in the Commons to remove this paragraph. The effect will be to require providers of complementary and alternative therapies to check those undertaking regulated activity in this area. Failure to do so will be an offence.

Secondly, paragraphs (d) to (g) of Clause 14(1) deal with those providing recreational, social, sporting or educational activities, those conducting a course of education or instruction wholly or mainly for vulnerable adults, the control or management of the provision of housing or the provision of welfare services—the latter will cover what we call "housing related support". These are the sectors where central vetting will be new in relation to vulnerable adults. We strongly believe that Clause 14 is important for these sectors as it will ensure that they are involved in the scheme as soon as possible. Naturally, it is essential to get the implementation of this scheme right. We have always thought it right to focus mandatory checks in heath and social care where the risk of abuse is highest.

However, we have listened to the understandable concerns expressed by noble Lords, and I am happy to give a commitment today that the Government will bring forward an amendment in another place to put a sunset clause in place in relation to paragraphs (d) to (g) so that they will cease to have effect after a set period of time following commencement of these provisions. We expect this to be in the region of three years. After that period, the exemption from the requirement to make a monitoring check in relation to paragraphs (d) to (g) of this clause will be removed. I believe that this will provide a helpful adjustment period for these sectors, where checks will be made in relation to vulnerable adults for the first time. During that time, we will seek to build up a culture of good practice in these sectors. Of course, employers will be aware that there will be a clear date for the expiry of this flexibility.

We do not intend to extend the sunset clause in relation to paragraphs (b) and (c), which deal with prison and probation services. I have spoken before about the needs of these unique services, but I have heard and understood the concerns articulated in previous debates about the particular vulnerability of these groups. I therefore make a commitment to the effect that all prison and probation officers will be checked and subject to monitoring once the scheme is operational. In addition, those working in young offender institutions who are currently checked by the Prison Service—that is, those working closely with prisoners in a caring or supervisory role—will also be checked. However, in other areas, I understand that a risk-based approach will be taken. So, for example, volunteers who are involved in counselling may be checked, but others who, for example, provide advice to a group of prisoners but are never alone with them may not be.

Paragraph (h) concerns an area where we do not think it would be appropriate to remove this clause. First, let us consider direct payments. Throughout the proceedings on the Bill, we have strongly resisted all calls to make barred status checks mandatory for direct payments recipients on the grounds that that would be strongly opposed by the recipients themselves. Therefore, we do not intend to extend the sunset clause in relation to direct payments.

> However, I remind noble Lords of the commitment I made on Report to require local councils, by means of a requirement to be set out in regulations, to inform direct payment recipients of their right to engage with the scheme. We believe this meets our shared goal to safeguard this group of people without removing their right to take decisions independently.
>
> I now turn to the issue of those requiring assistance in the conduct of their affairs. Again, this is an area where removing the exemption from the requirement to check after a set period would not work. For example, the lasting power of attorney has been designed to allow people with capacity to plan ahead for a time when they may lack capacity by choosing someone they trust to make decisions on their behalf when that time comes.
>
> The vast majority of people appointed in these cases are trusted relatives or friends of the individual in question, and therefore a barred status check would not be necessary or appropriate. It is envisaged that checks will be carried out by the Office of the Public Guardian only in circumstances where it is clear that the attorney is not a trusted family member or friend of the individual in question. By imposing mandatory requirements on this sector, not only would we be placing an unnecessary burden on individuals looking after the interests of loved ones but, arguably, we would be placing an unnecessary burden on the new scheme.
>
> As has been mentioned previously, we intend to launch a communications initiative, designed to promote awareness of the new scheme. We shall ensure that the campaign targets those people who will fall within Clause 14(1)(h) of the Bill so that individuals are aware of the availability of these checks and can decide whether they would like to use the scheme.
>
> I am grateful for noble Lords' scrutiny of this aspect of the Bill; I am confident that it will be better as a result. We shall ensure good communications with the sectors where checks will be new so that there is a smooth introduction. I am sure that the result will be exactly what we wish to achieve together: extending the safeguards as far and as fast as practicably possible.[36]

5. Inclusion on the barred lists

There will be four routes to inclusion on a barred list:

- Criteria specified in regulations that will lead to automatic inclusion on one or both of the barred lists without a right to make representations. Such criteria will include convictions and cautions in respect of specified offences.

- Criteria specified in regulations that will lead to inclusion on one or both of the barred lists subject to consideration of representations.

- Specified behaviour that leads to consideration for inclusion on one or both of the barred lists.

[36] HL Deb 7 June 2006 c1344-1346

- Risk of harm: where evidence suggests that an individual may present a risk of harm to children or vulnerable adults, this evidence leads to consideration for inclusion on one or both of the barred lists

a. Automatic inclusion without representation

The Government is taking powers to make affirmative regulations made under Schedule 2 of the Bill that will provide for an immediate automatic bar in respect of convictions and cautions for the most serious offences committed by adults against children or vulnerable adults. These will fall into two categories depending on whether there will be any right to make representations. Where there can be no doubt that an offender would pose a manifest risk of harm to children, such offences will result in an immediate automatic bar without a right to make representations. The Government is still considering precisely which offences would fall into that category. Lord Adonis gave the following indication:

> For the children's barred list, they will very likely include rape of a child under 13, sexual assault of a child under 13 and causing or inciting a child under 13 to engage in sexual activity. All of those are offences specified in the Sexual Offences Act 2003. For adults, they will likely include offences under the 2003 Act that are committed against an adult with a mental disorder.[37]

Concerns were raised by Baroness Walmsley as regards the compatibility of the automatic barring procedure with Article 6 of the *European Convention on Human Rights* which guarantees a right to fair hearing in certain circumstances.[38]

At Report Stage in the Lords, Baroness Sharp moved an amendment to give those under the age of 18 the right to make representations in all circumstances. She felt that with regard to this age group the Bill could represent "a move away from a child welfare approach with regard to under-18s to a criminal justice approach":

> Our reason for asking this is that it is important to remember that these young children are not young sex offenders. Most are not motivated by a sexual preference for children, although such behaviour can become entrenched. Rather, the behaviour is the response of a very vulnerable set of children to their own experiences and difficulties; it is a way of expressing anger and exerting power on the part of those with complex issues and needs. Such children are still in the process of maturation, and can be helped away from spiralling patterns of sexual abuse. While we need to acknowledge the risk these children pose to others, we must also acknowledge that these are children with severe needs who need help and specialised services themselves. What is more, there is clear evidence that such help can and does change behaviour for the good.[39]

An information note prepared by the DfES for Committee Stage in the Lords set out an "illustrative" list of offences that might be detailed in regulations. This also clarified how those under the age of 18 would be treated:

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37 HL Deb 28 March 2006 c725
38 HL Deb 2 May 2006 c181GC
39 HL Deb 24 May 2006 cc839-40

> We envisage that all automatic barring offences would apply only where the offender is 18 or over. All cases involving younger offenders would be considered on a discretionary basis. Any prescribed criteria to be included in regulations will be subject to consultation.[40]

b. Automatic inclusion subject to discretion

There is also provision for offences that would entail an automatic bar but with a right of representation. Lord Adonis gave the following indication of this category:

> Examples are likely to include offences relating to prostitution, pornography or trafficking. In those cases, the individual will have the opportunity to make representations to the IBB, where the individual claims that they do not present a risk to children or to vulnerable adults. The IBB in such cases will have discretion over whether to apply the bar. That will ensure that, if individuals have convictions or cautions for specified offences against vulnerable groups, a bar will cease to be imposed only if the IBB is absolutely convinced that on the evidence they do not pose a risk of harm to children or other vulnerable groups. I need hardly add that, in respect of those offences, there must necessarily be a very high threshold to pass. [41]

c. Specified behaviour and risk of harm

Some criminal records information will not lead to an automatic bar, but nevertheless may lead to a person being considered for barring by the IBB. There may also be consideration of hard and soft police information. In addition to police and other criminal records information, the scheme will receive information from:

- employers,
- professional and regulatory bodies,
- supervisory authorities (inspectorates)
- local authorities

The Government has confirmed that the scheme will exchange information with authorities such as the General Medical Council and the General Teaching Council. Lord Adonis said:

> Where information other than a conviction or caution for a prescribed offence suggests that an individual's behaviour was inappropriate, that the individual endangered a vulnerable person or that they present a risk, the facts will be carefully considered by the Independent Barring Board. A decision will be made following any representations made by the individual. The Independent Barring Board will provide individuals with all the information that was considered as part of a barring decision, ensuring that the process is open and transparent. That will also guard against cases of mistaken identity.

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[40] DfES note for Lords Committee Stage, *Information Note 1(i)*, April 2006, House of Commons Library Deposited Paper 06/860

[41] HL Deb 28 March 2006 c725

> In addition to police information, the IBB will receive information from employers, from professional and regulatory bodies and from local authorities—for example, where a member of staff is dismissed in circumstances that indicate a risk of harm to children or to vulnerable adults. The IBB will exchange information with authorities such as the General Medical Council and the General Teaching Council. Monitoring those sources will enable the IBB to alert the relevant employer if information is received that requires the bar to be applied. That is a significant strengthening of the present scheme.[42]

6. Gathering and sharing information

a. Duties to share and provide information

Clauses 25 to 38 of the Bill are concerned with the provision and sharing of information which may be relevant for the purposes of vetting individuals involved in regulated and controlled activities. Clause 25 refers to Schedule 4, which seeks to enable certain categories of applicant who are considering the suitability of particular individuals for involvement in regulated or controlled activities to apply to the Secretary of State for relevant vetting information about the individuals concerned. Clauses 26 and 35 provide that, in certain circumstances, the Secretary of State must notify specified individuals or supervisory authorities about those people who have been barred or have ceased to be subject to monitoring.

Clauses 27 to 29, 31 to 34 and 36 to 37 impose duties on regulated activity providers, personnel suppliers, local authorities, keepers of relevant professional registers and supervisory authorities who have information about individuals engaged in regulated and controlled activities to refer the information to the Independent Barring Board (IBB) in certain circumstances or provide it to the IBB on request.

A regulated activity provider or personnel supplier will be under a duty to refer information about an individual to the IBB where

a) the provider or other person withdraws permission for the individual to engage in a regulated or controlled activity (for example an employer dismisses an employee) or a personnel supplier stops supplying an individual for regulated or controlled activity; and
b) the reason for withdrawing the permission or stopping supplying the person is that the provider or personnel supplier thinks that any of the criteria specified in Schedule 2 for inclusion in a barred list applies.

The duty to refer will also apply if the provider, other person or supplier would, or might have, withdrawn permission for the person to engage in a regulated or controlled activity, or would have stopped supplying the person, if the person had not otherwise stopped being engaged in the activity through their own actions (such as where an employee resigned before he could be dismissed).

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[42] HL Deb 28 March 2006 c725

Under Clause 30 it will be an offence punishable by a fine of up to £5,000 for a regulated activity provider or personnel supplier to fail, without reasonable excuse, to refer information to the IBB or to provide it to the IBB on request.

Clauses 31, 33 and 36 require local authorities, keepers of the registers of professional bodies and supervisory authorities to provide the IBB with relevant information about an individual where they think that:

- The individual satisfies any of the criteria set out in Schedule 2 for inclusion in a barred list;
- The individual is engaged or may engage in a regulated or controlled activity, and
- IBB may consider it appropriate for the individual to be included in a barred list.

Local authorities, keepers of professional registers and supervisory authorities will also be required to provide information on request from the IBB if the IBB is considering whether or not to include or remove a person from a barred list.

Clause 35 requires the Secretary of State to share information with professional and regulatory bodies where individuals who may be on their registers are included in a barred list or cease to be subject to monitoring. The Secretary of State will also require the IBB to provide the body with the information it relied on in deciding to bar a particular individual. This is intended to enable the professional or regulatory body to decide whether to take action itself, such as the removal of the individual from the register.

Under Clause 38 the IBB will have a duty to provide a supervisory authority with relevant information it holds about an individual who it believes is engaged in regulated or controlled activity, whether or not the IBB has decided to bar the individual concerned. Information will be relevant for the purposes of this duty if it relates to the protection of children or vulnerable adults and to the exercise of the supervisory authority's function.

b. Exclusion of claims for damages

Clause 42 is designed to prevent claims being made in the civil courts for damages in respect of loss or damage suffered by any person as a result of:

- A person being included in a barred list
- A person not being included in a barred list
- The provision of prescribed information by any of the individuals or bodies who are required to share information with, and provide information to, the IBB under Clauses 27,28,29,31,32,33,34,36 and 37 of the Bill.

Claims for damages will not be excluded if loss or damage is suffered by a person as a result of the provision of prescribed information which is untrue by a person who

- knows the information is untrue; and
- is the originator of the information and knew at the time he originated it that it was untrue; or who
- caused another person to be the originator of the information knowing, at the time the information was originated, that it was untrue.

A provision designed to exclude claims for damages in relation to the provision of prescribed information was originally introduced by the education minister Lord Adonis during the Bill's committee stage in the House of Lords.[43] The provisions of Clause 42 allowing claims for damages to be brought in respect of the knowing provision of untrue information, was added after the Labour peer Lord Harris of Haringey successfully moved an amendment during the Bill's report stage. The Government supported his amendment. Lord Harris and Lord Adonis made the following comments during the debate:

> **Lord Harris:** […..] My concern throughout our consideration of the Bill has been twofold. First, I have wanted to see as broad as possible a mechanism for ensuring that people who may present a risk to children or vulnerable adults are picked up through this new mechanism and placed on the barred list. Secondly, however, I am concerned about situations where names might be put forward maliciously or without proper regard. These amendments would ensure that the legal indemnities, which were extremely wide in the original Bill, would not apply in situations where the provision of information that would lead to the Independent Barring Board considering whether to include someone on the barred list was originated by someone who knew that the information was untrue. In those circumstances, one would have to assume that the information had been provided maliciously. That is an essential safeguard.
>
> Later amendments address the requirement for a professional judgment to be expressed when considering whether someone may be liable to cause harm or may intend to do so, but what worries me are situations in which the judgment, regardless of whether it is expressed by a professional, may be used to harm an individual entirely maliciously. I can conceive of circumstances where that may happen, particularly in smaller organisations where a chief executive has found a certain member of staff irritating, annoying, disruptive and so on, but whose behaviour had nothing to do with their professional conduct in respect of children or vulnerable adults. That chief executive may decide, once the individual has left the organisation, that he will try to wreck their future career, and to do so by making a reference to the IBB. We must have a provision that protects people from that kind of abuse in what is otherwise an extremely important system. That is why the amendment is designed to ensure that anyone who may have such a malign intention to try to destroy someone's name and future career would not be the recipient of the indemnity that the Bill previously would have given them. That is why I think the amendment is important. It would provide a vital safeguard and make sure that the system is not brought into disrepute by individuals trying to abuse it. It is because I want the system to work that I believe it is important to reduce the legal indemnity originally included in the Bill. I beg to move.
>
> **Lord Adonis:** My Lords, my noble friend has rightly raised the issue of vexatious and malicious allegations masquerading as references of information to the Independent Barring Board. He raised the point both at Second Reading and in Grand Committee. We have given it a good deal of consideration and agree that it is important to limit the exemption from claims for damages in the case of vexatious and malicious allegations. We are therefore very glad that he has come forward with these amendments which refine the previous provisions made by the

[43] HL Deb 3 May 2006 cc271-272GC

> Bill. His new subsection (2) of Clause 43 would remove protection from damages claims in cases where the provider of the information knew that the information was untrue, and was either the originator of the information or caused another to be the originator of the information.
>
> We believe that it is important to limit the exception to these cases. We do not want to allow claims for damages to be made in cases where referring bodies are under a duty to provide information which they had no hand in creating and the content of which they could not control. But we see no reason why referring bodies should be protected from defamation claims in circumstances where they deliberately create defamatory material which they know to be untrue for the purpose of referring it to the IBB.
>
> We entirely agree with my noble friend in this regard. We understand the impact that allegations to the IBB will have on the personal and professional reputations of those affected, and we do not want allegations of untrue information to blight people's lives. On the other hand, we do not want to reduce the flow of information that is true, or genuinely believed to be true, because this information forms the basis on which the IBB can consider whether to include a person in the list.
>
> We are therefore very happy to support the amendments of my noble friend, as we believe that they address both these points. They give a legitimate exemption from claims for damages, but they do not impede the proper flow of information to the IBB. On that basis, we are content to accept the amendments of my noble friend.[44]

7. Reviews and appeals

A person who is included in one of the barred lists will be able to apply to the IBB under Schedule 2(16) for a review of his inclusion in the list. He or she will have to obtain permission from the IBB before applying for a review and may only apply after the end of the prescribed minimum barred period. The IBB will not be able to grant permission for a review unless it considers that the person's circumstances have changed in such a way that permission should be granted. If such a review takes place and the IBB is satisfied that it is no longer appropriate for the person to be included on the list it must remove him from it; otherwise it will have to dismiss the application.

Clause 4 of the Bill will enable a person who is included in a barred list to appeal to the Care Standards Tribunal, with the permission of the Tribunal, against a decision of the IBB to include him, or not to remove him, from the list. An appeal to the Tribunal will only be possible on the grounds that the IBB has made a mistake

- On any point of law; or
- In any finding of fact which it has made and on which the decision to include, or not to remove, the individual from the list was made.

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[44] HL Deb 24 May 2006 c831-832

Clause 4(3) provides that, for the purposes of the grounds of appeal, the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact. It will not therefore be possible to base an appeal on the issue of the appropriateness of an individual's inclusion on the list.

Unless the Tribunal finds that the IBB has made a mistake of law or fact it will have to confirm the IBB's decision. If the Tribunal finds that such a mistake has been made it will have powers to

- direct the IBB to remove the person from the list, or
- remit the matter to the IBB for a new decision.

If the Tribunal chooses the latter of these two options it may set out findings of fact it has made, on which the IBB will have to base its new decision. The person will be removed from the list until the IBB makes its new decision, unless the Tribunal directs otherwise.

There will be a further avenue of appeal from the decision of the Tribunal to the Court of Appeal with the Court of Appeal's permission. It will only be possible to make such an appeal on a point of law.

The review and appeal procedures set out in Clause 4 could be seen as being designed to reduce opportunities for individuals to make applications for judicial review of the decisions made by the IBB.

8. School governors

School governors are unlikely to have regular unsupervised access to children in the course of undertaking their role, and currently there is no formal requirement for all governors to undergo a check via the CRB; however, checks should be requested where the governor does have unsupervised access to children or where an individual gives 'cause for concern'. There is DfES guidance on pre-appointment checks for school governors. This notes that although these checks are not at present mandatory, the DfES strongly recommends them as good practice.[45]

The purpose of clause 12 of the Bill is to provide for school governors to be checked under the Bill's Vetting and Barring Scheme. Under clause 12 it will be an offence if an 'appropriate officer' fails to obtain within prescribed period vetting information (as defined in Schedule 4) in relation to a governor of an educational institution. The "appropriate officer" for each type of educational establishment, e.g. maintained schools, academies, etc. will be prescribed in regulations.[46] Provision is made in subsections (3) and (4) for pre-commencement positions and appointments. No offence is committed where the appointment of a governor took effect before the commencement of the clause and which continues to have effect after such time as the Secretary of State specifies by order.

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45 *Pre-Appointment Checks for School Governors – Interim Guidance*, DfES:

46 Explanatory Notes, paragraphs 47 and 48

The Bill does not specify who should pay for checks on school governors. However, the *Final Regulatory Impact Assessment (RIA) for the post-Bichard vetting and barring scheme* indicates that no charge is intended for volunteers. However, there will be an additional administrative burden and cost on the users of volunteers in the mandatory settings:

> Impact on volunteers and the voluntary sector
>
> 74. It is recognised that any change to the current arrangement of no charge to volunteers for a disclosure would place a new burden on this valuable group so no charge is intended.
>
> 75. However, there will be an additional administrative burden and cost on the users of volunteers in the mandatory settings (see Annex A) because even though the disclosure may be free, they may be charged by the umbrella body for processing the application.
>
> 76. Again this is mitigated by the fact that future users would only be required to do an online barred status check where the individual has been through the system once before. This facility is particularly valuable in the voluntary sector as voluntary work is frequently in addition to other work with children or vulnerable adults so their disclosure for that work would enable free and instant online checks for future volunteering work. Furthermore, volunteers often volunteer for more than one organisation, thereby gaining the same benefits across the voluntary sector.[47]

Clause 12 was not debated in the Lords.

9. Workers from overseas

While the Bill does not contain provisions addressed specifically to workers from overseas, Lord Adonis gave further information on the Government's approach to this issue at Second Reading in the Lords:

> A further important issue is the regulation of employees who come to this country from overseas. The Bill only partially covers employees from overseas. When such individuals have an employment record in this country, their UK employment will be covered by the IBB and CRB arrangements that I have set out. In respect of their overseas employment and any information available to the public authorities in their country of origin, my department has issued guidance, *Child Protection: Preventing Unsuitable People from Working with Children in the Education Service*. The guidance details the range of background checks that employers need to carry out. The guidance advises on the need to carry out checks as for UK-based te
> achers—for example, with references, qualifications, identity, as well as any appropriate police checks via embassies or local police forces.

[47] Paragraphs 74-76

> Although the CRB has access only to information held on specified UK data sources, the CRB and the Home Office are working with other countries on the sharing of criminal record information for employment vetting purposes in order to ensure the widest possible capture of relevant information for use by the vetting and barring scheme and by employers. My department is exploring with the CRB, the Recruitment and Employment Confederation and other stakeholders possible ways in which we could tighten further the arrangements for the vetting and recruitment of overseas staff.[48]

Baroness Buscombe drew attention to further concerns

> Will the Minister indicate how foreign nationals are to be monitored or barred? I listened with care to what the Minister said about arrangements for vetting and recruiting overseas staff. However, while cross-European co-operation is all very well, our information systems in the UK are not up to scratch. Liaison with foreign governments will certainly challenge that system. It is worth noting that the Home Office is unaware of the number of illegal immigrants currently living and working in the United Kingdom, so there will be no records available for such persons. Furthermore, in terms of devolved government, those individuals barred or monitored in Scotland or Northern Ireland must be made known to the relevant organisations in England and Wales. Differing information management systems must not prevent that process.[49]

Baroness Walmsley also contributed the following:

> This is a very difficult area for employers, who have to rely on what they can get from abroad. It would be quite wrong to prevent someone working with children or vulnerable adults just because they came from a country that did not have the same rigorous system as we are currently trying to devise. In fact, care homes for elderly people rely on many workers from abroad. Therefore, I was glad to hear what the Minister said in his opening remarks about the Home Office's work with other countries.
>
> I wonder whether the Government have considered a probationary period for overseas staff, with an extra level of supervision until the authorities in this country have been satisfied. That would not be perfect, but it would be better than what we have now. Alternatively, there could be a mandatory duty for an employer to prove that they have taken steps to obtain criminal records or other relevant information from abroad if their employee is from there, although I do not underestimate the difficulty for employers of having to do that.

The Government has said that it will introduce an amendment outlining prescribed criteria for automatic barring that will cover inclusion in an equivalent overseas list and an overseas order or direction. There will be further consultation on overseas criteria which will be prescribed in regulations subject to the affirmative procedure following Royal Assent.[50]

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48 HL Deb 28 March 2006 c726
49 HL Deb 28 March 2006 c728-9
50 DfES note for Lords Committee Stage, *Regulation Making Powers 2(ii)*, April 2006

10. Costs and charges under the new scheme

The Bill does not specify who should pay for checks on individuals. However, the *Final Regulatory Impact Assessment (RIA) for the post-Bichard vetting and barring scheme*[51] indicated that no charge was intended for volunteers. However, there will be an additional administrative burden and cost on the users of volunteers in the mandatory settings:

> **Impact on volunteers and the voluntary sector**
>
> 74. It is recognised that any change to the current arrangement of no charge to volunteers for a disclosure would place a new burden on this valuable group so no charge is intended.
>
> 75. However, there will be an additional administrative burden and cost on the users of volunteers in the mandatory settings (see Annex A) because even though the disclosure may be free, they may be charged by the umbrella body for processing the application.
>
> 76. Again this is mitigated by the fact that future users would only be required to do an online barred status check where the individual has been through the system once before. This facility is particularly valuable in the voluntary sector as voluntary work is frequently in addition to other work with children or vulnerable adults so their disclosure for that work would enable free and instant online checks for future volunteering work. Furthermore, volunteers often volunteer for more than one organisation, thereby gaining the same benefits across the voluntary sector.[52]

The following costs of the current system are taken from the *Final Regulatory Impact Assessment (RIA) for the post-Bichard vetting and barring scheme*: [53]

Direct costs to Government:	These are the running costs of the current barring lists and partially subsidising the CRB, which processes disclosures.
Indirect costs to Government	The cost to public sector organisations (eg NHS bodies, Local Authorities) of functioning as Registered Bodies, and therefore, processing disclosure applications. This is in addition to the fact that they also pay for many of the checks on their own staff.
Costs to other Registered Bodies / umbrella bodies	The cost to private sector organisations of functioning as Registered Bodies, and therefore, processing disclosure applications. This is often recovered through a charge on

[51] *Final Regulatory Impact Assessment (RIA) for the post-Bichard vetting and barring scheme*:
[52] *ibid*. paragraphs 74 -76:
[53] *ibid*. paragraph 81

	employers.
Costs to employers	Effective cost of Enhanced Disclosure for applicant; as employers can pay for the check.
Costs to employees	Formal cost of Enhanced Disclosure; i.e. it is the applicant.s responsibility to apply for the check via their employer and they may therefore pay for it.

The RIA goes on to provide the following estimates of the costs of the proposed new vetting and barring scheme, while noting that costing work on it is continuing:[54]

Cost areas	**Estimates**	**Principles of who might pay**
Set-up costs to build new scheme.	Up-front set-up costs are expected to fall within the provision of £16.6m over the years 2005-06 to 2007-08 to be provided by the Department for Education and Skills and the Department of Health. Cost elements will include the design of the scheme; enhancements to processes and systems; document, case management & call centre systems; and project management and consultancy	Up-front costs to be funded by Central Government, shared across participating Government Departments (potentially DfES, DH, HO and DCMS). Some cost elements may fall to be met through service or lease agreements, and therefore be regarded as operating costs.
Operating costs for central vetting scheme.	£12m to £15m per annum over first 5 years of scheme. Costs are anticipated to peak in 2008/09 as employers and employees identify with the merits of the scheme and apply for inclusion ahead of any statutory requirement. Steady state operating costs are around £14m.	Currently the CRB disclosure process is funded by a fee for each application. The enhanced features of the vetting and barring scheme, such as continuous updating, will cost more to provide. The level of the fee will be reviewed when the

[54] *ibid*. paragraph 82

		new scheme is introduced in 2008, and it will be affected by assumptions about how the new scheme is phased in and hence the volume of applications to be handled. Other funding options for the longer term include central Government funding and other forms of charges on scheme members or employers. These have advantages and disadvantages. No decision has been made to depart from fee funding.
Costs of CRB disclosure process	The Disclosure process in 2005/06 will cost circa £83m. The CRB currently charges £34 per disclosure except disclosures for the voluntary sector which are free of charge funded in part by the levy on Enhanced Disclosures. However, the Government is currently required to make up the £7m revenue deficit of the CRB largely due to volunteers.	See above.
Registered bodies and umbrella bodies costs (note that some RBs and many UBs are run as commercial operations and will therefore see a net benefit due to increased volumes)	Increased volumes of applicants will incur an additional cost to RBs (potentially a total cost of £6m) for handling and processing.	Employers or individuals pay for service (either directly if the RB is a commercial operations or indirectly if it passes on the cost to individuals through reduced salaries or higher professional fees).

The RIA adds that:[55]

> In terms of impact on the workforce it is important to highlight the significant net benefits that will flow to employers (largely in the public sector) from the change to a continuously updated system that will reduce the need for repeat CRB disclosures and speed up the recruitment process through instant access to the barred list. This could bring savings not just to individual employers but to the sectors as a whole.

As the next section of this paper explains, the Criminal Records Bureau is to make an online checking facility available free of charge, possibly via the e-government gateway, to employers with a legitimate interest.

11. Online checking

Under Schedule 4 to the Bill employers, professional and regulatory bodies and certain other bodies will be allowed to make checks of a person's barred status. This facility will require the individual's consent, except in the case where an application is made by a supervisory authority within the meaning of clause 36(6).[56] It will also be possible for those not under any obligation to check, such as parents employing a babysitter, to find out whether a person is barred or is subject to monitoring in respect of a regulated activity. The online facility is explained in a government note as follows:

> 5 The Criminal Records Bureau will make the online checking facility available free of charge, possibly via the e-government gateway to employers with a legitimate interest. We will consult stakeholders on the operation of the online check and on other methods by which employers might be able to check barred status if they cannot access an online check. The postal service is a possibility. The facility will need to combine ease of access with appropriate security.
>
> 6 When the vetting and barring scheme is in operation the online check is expected to become the primary mechanism for checking the barred status of individuals who are already subject to monitoring. The employer will have discretion to recruit without delay if the online check shows that an individual is subject to monitoring and not barred, so long as other checks, eg references, are completed too. This should speed up and simplify the recruitment process, but employers will also be able to obtain an enhanced disclosure from the CRB if they judge that necessary.
>
> **Information available**
>
> 7 The online checking facility will show whether or not the individual is covered by the scheme, whether or not the individual is barred, and whether the IBB is considering barring the individual. The facility will not contain any information about convictions, cautions, allegations or any other information about individuals

[55] *ibid*. paragraph 83
[56] Bill 194 of 2005-06

which might be known to the scheme from the monitoring process. The facility will not give access to the database as a whole, but only to the relevant information about the individual in question.

Security

8 The facility will provide an individual's barred status following an appropriate authorisation process, and the required authentication prior to each access. Access will need to be subject to proof of the individual's consent. The Government is considering tabling an amendment to make illegitimate access a criminal offence, punishable by a maximum of 6 months imprisonment and/or a fine.

Cost

9 The online check will be free at the point of use, and its cost will be covered in the fee for each application for monitoring. The online check is one of the enhanced features of the vetting and barring scheme, and these features will mean that the scheme will cost more to provide than the CRB enhanced disclosure. The level of the fee will be reviewed when the new scheme is introduced in 2008, and it will be affected by a number of factors including assumptions about how the new scheme will be phased in and hence the volume of applications to be handled. [57]

12. Definition of vulnerable adults

The note provided by the Government for the Bill's Committee Stage in the House of Lords set out the following about the definition of vulnerable adult, which is set out in clause 44 of the current version of the Bill:

> 2. Our intention is for the new vetting and barring scheme to apply as widely as possible across the vulnerable adults' workforce. For the purpose of the Safeguarding Vulnerable Groups Bill, we have defined the term "vulnerable adult" according to the service or setting that may make an individual vulnerable to abuse. This is defined in clause 43 of the Bill. For the purpose of this Bill, a vulnerable adult is someone who is:
>
> - in receipt of health and social care services
> - living in sheltered housing, supported housing or registered residential accommodation
> - requiring assistance in the conduct of their own affairs
> - in prison or in contact with probation services
> - detained under Immigration Act powers
> - involved in certain activities targeted at vulnerable adults eg sport and leisure activities, some forms of education and training, and certain social activities

[57] DfES note for Lords Committee Stage, *Information Note 1(vi)*, April 2006, House of Commons Library Deposited Paper 06/860

> 3. The definition is intended to be flexible and for this reason the categories of settings and services are expressed in general terms. Drawing the categories too narrowly might lead to groups of persons, that we would otherwise a wish to include, being left out. In addition, general categories will allow us to respond to changes in service provision in the future.[58]

II Related Issues

A. Records of individuals who are considered unsuitable to work with children or vulnerable adults

1. Information held by the police

a. Criminal records and intelligence

Records of criminal convictions, cautions, other disposals and acquittals are held by the police, who also retain other forms of intelligence information about particular individuals and information derived from sex offender registration.

b. The "Sex Offenders Register": notification requirements under the Sexual Offences Act 2003

The "sex offenders register" is another name for the notification requirements imposed on sex offenders, which were introduced by Part 1 of the *Sexual Offenders Act 1997* with effect from 1 September 1997. The notification requirements are intended to be a management tool to assist the police in the detection of sexual crime and enable the police and probation services to be informed of the whereabouts of sex offenders so that they can try to manage the risks such offenders pose. The provisions of the 1997 Act were re-enacted, with some amendments, by Part 2 of the *Sexual Offences Act 2003,* which came into force in May 2004.

The notification requirements, which are set out in sections 83-85 of the 2003 Act, are imposed on any person convicted of, or cautioned for, any of the offences listed in Schedule 3 of the Act (a "relevant offender") for a length of time specified in section 82 of the Act ("the notification period"). They require a person who is subject to them to attend a police station, within 3 days of his conviction or caution and annually thereafter, and provide certain specified information, including his date of birth, national insurance number, name and aliases, home address and other addresses in the UK where he regularly stays. The offender must also notify the police of any changes of name or address within 3 days of the change.

The length of the notification period varies according to the sentence given to an offender. In the case of a person given a caution the notification period, during which time the notification requirements will apply, is two years beginning with the date of the caution. Individuals given custodial sentences of 30 months or more will be subject to

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[58] DoH note for Lords Committee Stage, *Information Note 1(v)*, April 2006, House of Commons Library Deposited Paper 06/860

the notification requirements indefinitely. An offender attending a police station to make a notification must also comply with a request from the police to take his fingerprints and photograph any part of him for identification purposes.

It is an offence punishable by up to 5 years' imprisonment for a relevant offender to fail to comply with the notification requirements under the 2003 Act.

c. Access to information on the whereabouts of sex offenders

Information held by the police on sex offenders is not available to the general public. Home Office guidance to the police states that information they hold on offenders should be revealed only where the risk to the public or to sections of the public outweighs the offender's right to privacy.[59]

Press commentators often compare the lack of public access to information derived from sex offender registration in the UK with the arrangements permitting public access to such information in the USA. Arrangements for the registration of sex offenders have existed in the US for several years. In California and Arizona registration has been in place for over 50 years, but in most states the introduction of registration dates from 1990 onwards. All 50 states now have registration requirements. These vary considerably, although registration practice has been converging, partly as a result of initiatives by the federal government, including legislation and guidance. The legislation includes “Megan’s law”, a 1996 law which required states to enact laws allowing public access to, or dissemination of, registration. Some commentators have noted that levels of compliance with registration requirements are higher in the UK than they are in the USA and have suggested that public access to the information derived from registration may be a factor influencing non-compliance with registration requirements in some parts of the USA.[60]

Following the murder of Sarah Payne in July 2000 the *News of the World* said that it would “name and shame” all sex offenders convicted of offences against children in the UK. It went on to publish photographs and other information about a number of sex offenders. The newspaper’s campaign generated considerable controversy and there was a number of vigilante attacks on alleged sex offenders in various parts of the country. The *News of the World* and a number of other newspapers then went on to campaign for the enactment of “Sarah’s law” - a general public right of access to information about the whereabouts of sex offenders.

On 15 September the then Home Secretary, Jack Straw, announced a package of measures intended to strengthen the protection of children and provide better information to the public on the management of sexual and violent offenders in the

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59 *Sex Offenders Act* 1997, Home Office Circular 39/1997, 8 August 1997, Appendix A:

60 See Library standard note SN/HA 00552 *Sex offender registration in the UK and the USA,* published in 2000, which discusses some of the research on sex offender registration in the USA, (only available on the Parliamentary Intranet).

community.[61] The package of measures announced by Mr Straw did not include a general public right of access to information about sex offenders. In his announcement Mr Straw said that he had decided against permitting some form of controlled public access to the sex offenders' register. The Home Office press notice quoted him as saying:

> These proposals have come about after close consultation with the police and probation services. As part of this, I have considered very closely the question whether there could be some form of controlled access to the Sex Offenders' Register. But in practice controlling such access would be impossible to enforce. The arguments against a general right of access are well rehearsed. Such an arrangement would not in our judgement assist the protection of children or public safety.
>
> Controlled disclosure is I believe the better and safer route. Therefore I have concluded that the professional agencies - the police and probation services - are best placed to determine the disclosure of information on individual sex offenders.
>
> But I do believe that the public should have a right to know what measures the police and probation services have in place to protect the public. The guidance which I will issue will also include the question of disclosure of information to groups or individuals and will help to develop a consistent approach. The introduction of the Criminal Records Bureau will enable better information to be provided.[62]

d. Multi-Agency Public Protection Arrangements (MAPPA)

The *Criminal Justice and Court Services Act 2000* introduced a statutory duty on the police and the probation service to make joint arrangements for the assessment and management of risks posed by sexual and violent offenders, including paedophiles, and by other offenders who may cause serious harm to the public. These multi-agency public protection arrangements (MAPPA) were established in each of the 42 police and probation areas of England and Wales from April 2001 and are intended to strengthen the effectiveness of the assessment and management of the risks posed by sexual and violent offenders. An assessment of the new arrangements was set out in the central annual report on the MAPPA, published on 22 July 2002.[63] Regional annual reports for 2004/5 were deposited in the Commons Library on 17 October 2005.[64]

e. ViSOR

ViSOR – the Violent and Sex Offender Register – is a new shared IT application developed by the police and the probation service. It provides a national database for the police and the probation service in England and Wales jointly to register, risk-assess and manage sex offenders and dangerous or violent offenders. There are plans to include other partners in the future, for example the prison service, courts, Crown Prosecution

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61 Home Office press release 283/2000, *Government proposals better to protect children*, 15 September 2000

62 *ibid*.

63 Home Office, *Multi-Agency Public Protection Arrangements, Annual Report 2001–2*, July 2002:

64 House of Commons Library Deposited Paper 05/1226

Service, Immigration and Customs & Excise, and also to extend the geographical area covered to include Scotland, Northern Ireland, Isle of Man and the Channel Isles. The Government has so far spent £11 million establishing ViSOR and expects to spend a further £4.5 million annually running the system.[65]

The website of the Police Information Technology Organisation (PITO) gives updated information on progress with ViSOR:

> ViSOR – the Violent Offender & Sex Offender Register – is playing a vital role nationally in keeping tabs on sex, dangerous and violent offenders.
>
> Until now, the police, probation and prison services have relied on local unconnected databases to record details of offenders on their patch. This has made it difficult to keep track of individuals as they move from area to area.
>
> ViSOR will provide both agencies with a shared national database for all agencies to register, risk assess and manage sex offenders, as well as violent offenders and others who may cause serious harm to the public.
>
> It holds information on individuals convicted of sex offences, or jailed for more than 12 months for violence, as well as unconvicted individuals who are still assessed as posing a risk.
>
> The information sharing potential under ViSOR will make life easier for police and probation officers responsible for monitoring these offenders. It means that intelligence added by a probation officer in the north of the country will become immediately searchable by a police officer in the south. In addition, prison staff will be able to receive essential information on the danger offenders pose, along with being able to contribute intelligence.
>
> ViSOR contains a wealth of information on individuals, including their modus operandi, details of any orders and risk assessments. Users can also access details of previous convictions, as ViSOR is linked to the Police National Computer (PNC). A photographic library of the offender over time, including distinguishing marks and tattoos, will make it harder for an individual to change appearance and re-emerge undetected in another part of the country.
>
> Critically, ViSOR provides an accountability and audit trail to demonstrate that monitoring is taking place. As well as being an effective tool for the routine management of offenders, the application's search and retrieval capabilities will also make it a powerful tool in major crime investigations such as abductions, assaults and murders.
>
> Roll-out of ViSOR continues apace, with all forces in England, Wales, Scotland and Northern Ireland fully live by May 2005. The Police Service of Northern Ireland (PSNI) has also been connected in preparation for full live service at a future date.
> In addition, other police units, such as the British Transport Police, the National Criminal Intelligence Service (NCIS), the National Crime Squad (NCS) and the Serious Crime Analysis Section (SCAS), which carries out analytical work on

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[65] HL Deb 10 May 2006 c147-8WA

behalf of police forces, will be provided with access to ViSOR. A pilot is being carried out within the Prison Service to establish its business needs.

Work is currently being undertaken to ensure prison and probation networks are capable of carrying confidential data, and rollout of ViSOR to these agencies is scheduled over 2006-2007.

Users have had a major input at every stage of ViSOR's design. Its development within PITO was overseen by a team drawing on experience from the police and probation services, as well as technical experts from PITO and the wider criminal justice arena. An interim solution, developed by Lancashire Constabulary, helped pave the way for ViSOR.

ViSOR fully supports the Multi-Agency Public Protection Arrangements (MAPPA). It also complies with the Human Rights Act and Data Protection Act. [66]

2. Lists maintained by Government departments

a. List 99

Section 142 of the *Education Act 2002* gives the Secretary of State for Education and Skills the power to direct that a person may not carry out work providing education at schools, further education institutions and certain other educational contexts, or may only carry out such work in specified circumstances or under specified conditions, where the work brings the person regularly into contact with children. This process has been in operation for many years, and the list of those individuals subject to a bar or restriction is known as 'List 99'. A Government review of the List 99 decision-making process which was made in January this year (see below) described in detail how List 99 works and how the system has been changed over time.

A direction may be made by the Secretary of State in respect of a person only on the following grounds

- he or she is included in the list kept under section 1 of the *Protection of Children Act 1999* (the PoCA list);[67]
- he or she is unsuitable to work with children;
- on grounds relating to misconduct
- on grounds relating to the person's health
- in relation to taking part in the management of an independent school, on grounds relating to a person's professional incompetence

The DfES's List 99 covers a much wider range of circumstances in which a person might be considered unsuitable to work with children than the fact that they have a criminal record. Individuals may be included on the list following a direction under the 2002 Act without ever having been the subject of criminal investigations or prosecution.

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66 https://web.archive.org/web/20030625151134/http://www.pito.org.uk/what_we_do/intelligence_investigation/visor.htm

67 See below

Employers and agencies in the education service are required to make checks to find out whether a person applying to work with children is on List 99, and must not employ a person contrary to the terms of any direction issued by the Secretary of State. More detail about the Secretary of State's current power to prohibit people from teaching or working with children is provided in the *Education (Prohibition from Teaching or Working with Children) Regulations 2003*,[68] and the *Education (Prohibition from Teaching or Working with Children) (Amendment) Regulations 2004.*[69] Under the regulations the following individuals are automatically barred and included on List 99:

a) any adult who has pleaded guilty to or been found guilty of an offence set out in Schedule 2 of the regulations involving a child under the age of 16, or an attempt to commit such an offence, and who was carrying out work to which section 142 of the 2002 Act applies before or at the time he committed or was convicted of the offence;

b) anyone included, otherwise than provisionally, in the PoCA list

c) anyone who, on or after 1 June 2003, is made the subject of a disqualification order under sections 28 or 29 of the *Criminal Justice and Court Services Act 2000* and was carrying out work to which section 142 of the 2002 Act applies before or at the time he was committed or was convicted of the order to which the disqualification relates.

The offences set out in Schedule 2 of these regulations include most sexual offences, including all the principal sexual offences involving children or indecent images of children. Teachers who plead guilty or are convicted of such offences should therefore be subject to automatic prohibition and inclusion on the List.

In cases other than those to which automatic prohibition applies the issuing of a direction including an individual on the list has been a matter for the Secretary of State's discretion. This has also been the case in instances where an individual's behaviour has resulted in a caution rather than a criminal conviction. Each case in which the inclusion of a person on the List is a matter for the Secretary of State's discretion must be considered individually. A bar or restriction may be reviewed by the Secretary of State and in some cases there is a right of appeal to the Care Standards Tribunal, depending upon the grounds on which the original direction was given.

The National Assembly for Wales has the power to make similar regulations and keep a similar list under section 142 of the 2002 Act. In practice, the Secretary of State exercises his or her powers of discretion on behalf of the National Assembly under a concordat arrangement.[70]

Earlier in the year, concern focused on the discretionary decisions made by Ministers not to include on List 99 individuals who had been placed on the Sex Offenders Register. In response, Ruth Kelly, the then Education Secretary, announced a review of the List 99

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68 SI 2003/1184: http://www.opsi.gov.uk/si/si2003/20031184.htm
69 SI 2004/1493: http://www.opsi.gov.uk/si/si2004/20041493.htm
70 *ibid.*

cases and changes to the decision-making process.[71] The changes were announced by the Education Secretary in a statement on 19 January 2006 and in an accompanying report to Parliament that outlined the Government's analysis of, and response to, issues concerning child protection and List 99.[72] A further statement was made on 1 March 2006 giving an update on progress.[73]

The key commitment was to introduce legislation to remove the responsibility for barring decisions from Ministers to a new and independent statutory board. In advance of the legislation, a panel of independent experts, chaired by Sir Roger Singleton, the former head of Barnardo's, was established to oversee the List 99 process. In addition several other reforms of the vetting and barring system were announced.

The role fulfilled by Sir Roger Singleton, as chair of the independent panel, is to advise the Secretary of State on individuals referred to the DfES as potentially being unsuitable to work as part of the education workforce, and therefore to be considered for possible inclusion on List 99. The chair reviews cases put before him and, where appropriate, he seeks additional advice from his panel of experts. He then advises the Secretary of State as to the extent to which an individual poses a risk of harm to children and thus influences the extent to which the Secretary of State considers exercising powers under Section 142 of the 2002 Act. The Secretary of State will make the final decision in each case taking into account that advice.

In the statement on 19 January 2006, the then Secretary of State also announced that new regulations would be introduced to ensure that any individual working with children who is convicted or cautioned for sex offences against children will be automatically entered on List 99 and barred from working in schools and other education settings. The new regulations are in the process of being drawn up and will be consulted on before they are laid.[74]

The *Safeguarding Vulnerable Groups Bill* makes provision for the automatic barring of certain individuals under the new system. The Government has issued an information note setting out how automatic barring currently works for List 99 and how it will work under the new arrangements.[75]

b. The POCA list and the POVA list

Two additional lists which provide names of individuals who are intended to be prohibited from certain types of paid or voluntary employment are the Protection of Children Act (POCA) List created by the *Protection of Children Act 1999* and the Protection of Vulnerable Adults (POVA) List created by the *Care Standards Act 2000.* Individuals can be referred for inclusion on these lists if the criteria for referral for inclusion on them,

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71 HC Deb 12 January 2006, cc 435-445

72 Oral statement, HC Deb 19 January 2006 cc 966-80; *Review of List 99 decision making process and policy implications*, Library deposited paper 06/203

73 Written Ministerial Statement, HC Deb 1 March 2006 cc21-25WS

74 Source: DfES official, 12 June 2006

75 *Automatic Barring - Safeguarding Vulnerable Groups Bill 2006*, Information Note 1(i), DfES April 2006; Prescribed Criteria for Automatic Barring - *Safeguarding Vulnerable Groups Bill 2006*, DfES April 2006

which are set out in the legislation creating the lists, are fulfilled. As is the case with List 99, the POCA and POVA lists cover a wider range of circumstances in which a person might be considered unsuitable to work with children or vulnerable adults than the fact that they have a criminal record and individuals may be included on them without ever having been the subject of any criminal investigation or prosecution.

c. The POCA List

Section 7 of the *Protection of Children Act 1999* states that where a "child care organisation" proposes to offer an individual employment in a "child care position", the organisation must ascertain whether the individual is included in any of these lists of people considered unsuitable to work with children, and, if they are, must not offer them employment in such a position. Where a child care organisation discovers that an individual already employed in a child care position is on one of these lists, they must cease to employ them in that position. Where a child care organization proposes to employ someone in a child care position through an agency, they must satisfy themselves that within the last 12 months the agency checked that the individual was not on any of these lists.

The "child care positions" for which a check is mandatory are "regulated positions for the purposes of Part II of the *Criminal Justice and Court Services Act 2000*" (CJCSA).[76] Part II of that Act introduced measures designed to "complete the establishment of an integrated system for the protection of children. Under this system those who 'come to notice' as posing a risk to children, either when working with children in the health or education sectors or by commission of a serious criminal offence against a child, may, after a proper process, be made subject to a statutory ban on working with children".[77] The provisions came into force on 11 January 2001.[78]

Section 36 of the CJCSA (when taken with definitions contained in section 42) provides a comprehensive definition of "working with children" in a "regulated position". The Home Office guidance emphasises that the definition of work is very broad:

> It applies to far more than paid employment. It includes any kind of work, whether paid or unpaid, whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract. The definition of work therefore covers the public, private, voluntary and volunteering sectors. If there is any doubt as to whether a particular position involving the provision of any skill or labour, no matter what the terms and conditions, falls within this definition of 'work', it should be assumed that it does, unless specific legal advice is obtained to the contrary.[79]

The guidance describes the eight basic sets of regulated positions covered by the legislation:

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76 POCA, section 12
77 Explanatory Notes to the Act, para 12
78 SI 2000/3302
79 Home Office, *Criminal Justice and Court Services Act 2000, Protection of Children, Guidance*, , para 8.3

Employment in certain establishments
(sub-paragraph 36 [1] [a] of CJCSA)

8.7 The first regulated position depends not on the nature of the work, but on the nature of the establishment in which the work is carried out. These are areas of work providing functions of various sorts exclusively or mainly for children. In each of these establishments it is considered right that all members of staff, whether primary or secondary carers, or ancillary staff, should fall within the definition of working with children. This is to meet the legitimate expectation of parents and society at large in respect of all staff in certain environments, such as schools or children's homes or children's hospitals, whether or not they have direct access to children.

Day care premises
(sub-paragraph 36 [1] [b] of CJCSA)

8.8 Similarly the second position depends not on the nature of the work, but on the nature of the establishment in which the work is carried out. However, although normal duties that include work on day care premises are covered, work is not counted as being done on day care premises if it takes place in another, discrete part of the premises in which the day care premises are situated, or if it occurs during times when children are not being looked after. For example, a crèche that runs in a particular room of a building during the school holidays might count as day care premises. A cleaner who worked in another part of the building, or who only entered the crèche room at the end of the day, after the children had left, or who only entered the room during days on which the crèche was not running, would not be considered as holding a regulated position.

Caring for, training, supervising or being in sole charge of children
(sub-paragraph 36 [1] [c] of CJCSA)

8.9 This sub-paragraph sets out the various roles that turn a position into a regulated position, irrespective of what organisation or area of work it is within. It is a key part of the definition as it affects a wide range of organisations. Any position whose normal duties include caring for, training, supervising, or being in sole charge of children is considered a regulated position. Examples might include nurses working every day on a children's ward in a hospital (other than a hospital exclusively or mainly for children), coordinators of youth groups, or Sunday School teachers.

8.10 Those caring for, training, supervising or in sole charge of children in employment are specifically excluded from this part of the definition, and that in subparagraph 36 (1) (d), as this aspect is dealt with separately (see below).

8.11 It may be helpful to note that this definition is also that used as the gateway for enhanced disclosure of criminal records by the Criminal Records Bureau to be set up under the Police Act 1997.

Unsupervised contact
(sub-paragraph 36 [1] [d] of CJCSA)

8.12 This is another fundamental and comprehensive part of the whole definition of working with children. Again it is based on the role being undertaken by the individual, not the area of work. Any position whose normal duties involve unsupervised contact with children under arrangements made by a responsible

person (for example, a parent, guardian, or primary carer) is considered a regulated position. This would cover for example the mini-cab firm whose drivers are employed to transport children as discussed above on a regular basis.
8.13 As before, such duties as are covered here but relate to child employment are specifically excluded.

Child employment
(sub-paragraphs 36 [1] [e] and [f] of CJCSA)

8.14 In every other respect, Part II of CJCSA considers children to be those under the age of 18. For the purposes of these two sub-paragraphs of the definition of working with children alone, a child is considered to be someone under the age of 16. This is because this is the age at which a child may leave education and join the workforce at large. If a child finishes formal education at the age of 16 and immediately enters employment it is not reasonable for a manager to be obliged either to reject the child as a worker, or impose constraints on his or her current employees. Someone supervising supermarket workers should not have to move his or her job or be dismissed because a 16 or 17 year old is one of those being supervised. However, where a child is under the age of 16, then those responsible for caring for them in the course of their employment would be in regulated positions. This would cover, for example, the persons caring for children working in the entertainment industry. In addition, those a substantial part of whose normal duties include supervising or training children under the age of 16, are considered to be 'working with children'.

Other positions
(sub-paragraph 36 [1] [g] of CJCSA)

8.15 These are positions that are considered to grant those who hold them the kind of access to children, or the kind of influence and position which, if the holder of the position were disqualified, could place the children at risk. These include charity trustees of a children's charity, relevant local government bodies (with certain specific social services and education functions), members of the Youth Justice Board, and the Children's Commissioner for Wales. Such positions may provide privileged access to children. They may imply that the individual concerned is a person who can be properly trusted with children. They are therefore included even if contact with children is not a regular part of the position. Note that when this legislation is applied in Northern Ireland, additional positions relevant to that part of the United Kingdom are included.

Supervising or managing someone in a regulated position
(sub-paragraph 36 [1] [h] of CJCSA)

8.16 Those who supervise or manage individuals in regulated positions are covered by this part of the definition. This sweeps up individuals who, though otherwise not holding regulated positions, by virtue of their authority over others who do, could thereby facilitate or cover up any misconduct or abuse which occurred. As well as immediate managers and supervisors, it covers those with the authority to dismiss an individual in a regulated position. The need for such

> positions to be regulated has been demonstrated by events in various children's homes where abuse was not uncovered until long past the event.[80]

Under section 35 of the *Criminal Justice and Court Services Act 2000* it is an offence punishable by up to five years' imprisonment for a person knowingly to offer work to, or to employ an individual in a "regulated" position (which includes child care positions), if the individual is disqualified from working with children, either by virtue of being included on the POCA List or List 99 or by virtue of a disqualification order made by a court under sections 28 or 29 of the 2000 Act. It is also a criminal offence punishable by up to five years' imprisonment for a person to apply or offer to work, accept work or continue to work with children in such positions if he or she has been disqualified.

The power of courts to make disqualification orders under the 2000 Act is to be repealed by the *Safeguarding Vulnerable Groups Bill*, under amendments introduced by the Government during the Bill's third reading in the House of Lords.[81]

d. The POVA List

Section 81 of the *Care Standards Act 2000* (which applies only to England and Wales) imposes a duty on the Secretary of State to keep a list of people considered unsafe to work with vulnerable adults:

> **81 Duty of Secretary of State to keep list**
>
> (1) The Secretary of State shall keep a list of individuals who are considered unsuitable to work with vulnerable adults.
>
> (2) An individual shall not be included in the list except in accordance with this Part.
>
> (3) The Secretary of State may at any time remove an individual from the list if he is satisfied that the individual should not have been included in it.

The list is called the Protection of Vulnerable Adults List (POVA List). The CRB informs registered bodies who apply for a standard or enhanced disclosure about the record of someone they want to employ to work with vulnerable adults and whether or not they are on the POVA list. The CRB performs the same function in respect of the POCA list where applications from registered bodies about people who want to work with children are concerned.

Section 89 requires anyone providing care to vulnerable adults to check whether their staff are included in his list. If they are, they must not be employed:

> **89 Effect of inclusion in list**
>
> (1) Where a person who provides care to vulnerable adults proposes to offer an individual employment in a care position that person—

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80 Ibid

81 HL Deb 7 June 2006 c1337-1340

(a) shall ascertain whether the individual is included in the list kept under section 81; and

(b) if he is included in that list, shall not offer him employment in such a position.

(2) Where a person who provides care to vulnerable adults discovers that an individual employed by him in a care position is included in that list, he shall cease to employ him in a care position.

For the purposes of this subsection an individual is not employed in a care position if he has been suspended or provisionally transferred to a position which is not a care position.

(3) Where a person who provides care to vulnerable adults ("the provider") proposes to offer employment in a care position to an individual who has been supplied by a person who carries on an employment agency or employment business, there is a sufficient compliance with subsection (1) if the provider—

(a) satisfies himself that, on a date within the last 12 months, the other person ascertained whether the individual was included in the list kept under section 81;

(b) obtains written confirmation of the facts as ascertained by that person; and

(c) if the individual was included in the list on that date, does not offer him employment in a care position.

(4) It is immaterial for the purposes of subsection (1) or (3) whether the individual is already employed by the provider.

(5) An individual who is included (otherwise than provisionally) in the list kept by the Secretary of State under section 81 shall be guilty of an offence if he knowingly applies for, offers to do, accepts or does any work in a care position.

(6) It shall be a defence for an individual charged with an offence under subsection (5) to prove that he did not know, and could not reasonably be expected to know, that he was so included in that list.

(7) An individual who is guilty of an offence under this section shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months, or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding five years, or to a fine, or to both.

These provisions were brought into force on 26 July 2004.[82] There was a phased introduction of the POVA scheme, details of which were set out in a press notice from the CRB.[83]

B. Employer access to criminal records and information from the Lists: the Criminal Records Bureau

1. Background

Records of criminal convictions, cautions, other disposals and acquittals are held by the police, who also retain other forms of intelligence information about particular individuals and information derived from sex offender registration. List 99, the PoCA List and the PoVA List are held by the Department for Education and Skills (DFES) and the Department of Health. These documents and records are not publicly available. Checks on whether or not individuals have criminal records, or are on List 99, the PoCA list or the PoVA list, are made through the Criminal Records Bureau (CRB), which operates a one-stop Disclosure Service.

The disclosure arrangements operated by the CRB are intended to provide information to enable prospective employers or voluntary organisations to assess the suitability of prospective employees, or volunteers as the case may be. Where teachers and other people applying to work in schools or child care positions are concerned the checks are particularly intended to enable an assessment to be made about the person's suitability for paid or voluntary work which would give them access to children.

2. *Police Act 1997*, Part V

Part V of the *Police Act 1997,* which was brought into force in March 2002, was designed to widen access to criminal records for employers and voluntary organisations appointing people to sensitive posts, particularly those involving work with children or other vulnerable groups. The Criminal Records Bureau (CRB), which was established under Part V of the 1997 Act, acts as a "one stop shop" providing a Disclosure Service. Information about the service is available on the CRB website.[84] The CRB website lists the information that may be accessed through the Disclosure Service:

> **What information is available through the Disclosure service?**
>
> The CRB's Disclosure service provides access to a range of different types of information, such as, information:
>
> - held on the Police National Computer (PNC), such as, convictions, cautions, reprimands and warnings in England, Wales and those recorded from Scotland. There is also some Northern Ireland conviction data held on PNC
> - held by local police forces relating to relevant non-conviction information

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82 *Care Standards Act 2000 (Commencement No 20) Order 2004*, SI No 1757
83 CRB News: *Protection of Vulnerable Adults (POVA) Launch*, 15 June 2004
84 Criminal Records Bureau: http://web.archive.org/web/20030204000719/http://www.disclosure.gov.uk/

- from the Government's Protection of Children Act List (PoCA)
- from the Government's Protection of Vulnerable Adults List (POVA)
- held by the Department for Education and Skills (DfES) under Section 142 of the Education Act 2002 (formerly known as List 99)[85]

The CRB, which is an Executive Agency of the Home Office, is based in Liverpool and started operations on 11 March 2002. It was initially set up as one of the two operational arms of the Passport and Records Agency – the other arm being the Passport Service. The operation suffered from serious teething problems after it was swamped with applications. A thorough review began in September 2002 and in February 2003 the government announced new proposals to help the CRB work more effectively.[86] The report of the Bichard Inquiry into the Soham murders, published in 2004, found that there were still problems to be resolved. The Home Office has so far published three progress reports on its implementation of the Bichard Inquiry report's recommendations (see below).

In all cases it is prospective employees who must apply for disclosure. Thus, information cannot be released to a prospective employer without the agreement of the individual concerned. Most employers have no rights to apply to the CRB themselves for information about the records of prospective employees. Only registered employers and voluntary organisations – i.e. those likely to be employing people in sensitive posts – have the right to ask for the information, and they have to do this jointly with the applicant. In other cases, employers may make a job offer conditional on a clean criminal record, but it will be up to the applicant to apply for the record.

The *Police Act* does not require any employers to carry out pre-employment criminal record checks. Other legislation, such as the *Care Standards Act 2000* and the *Protection of Children Act 1999,* requires certain employers to conduct pre-employment checks for certain posts involving contact with children or vulnerable adults.

3. Scotland

A separate agency, the Scottish Criminal Records Office (SCRO), administers criminal record disclosures in Scotland.[87] The *Police Act 1997 (Criminal Records)(Scotland) Regulations 2006* SI No. 96 came into force on 1 April 2006 and have a number of implications for the Disclosure Service. One of the major changes is the ability, in certain circumstances, to obtain an Enhanced Disclosure when previously applicants could only have obtained a Standard Disclosure.[88]

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85 CRB, *DIP 017 -Applicant's Guide to the CRB's Disclosure Service*:

86 Home Office Press Release 055/2003 *Government announces new measures to improve Criminal Records Bureau* 27 February 2003

87 SCRO: http://www.scro.police.uk/
Disclosure Scotland: http://web.archive.org/web/20050206024706/http://www.disclosurescotland.co.uk/

88 2006 Scottish Regulations: http://www.opsi.gov.uk/legislation/scotland/ssi2006/ssi_20060096_en.pdf

4. Types of disclosure

Part V of the *Police Act 1997* requires the Secretary of State (in practice the CRB) to issue various types of certificate showing whether or not an individual has a criminal record. There are three types:

- Criminal conviction certificates (under section 112 of the Act)
- Criminal record certificates (under sections 113 and 114 of the Act), and
- Enhanced criminal record certificates (under sections 115 and 116 of the Act)

The CRB calls these **basic, standard** and **enhanced disclosures**, respectively.

a. Basic Disclosure

Basic Disclosure is not yet available in England and Wales although it is in Scotland. All employers and volunteering organisations will be entitled to ask prospective employees/volunteers to obtain a Basic Disclosure. This Disclosure will be available to all members of the public and be obtainable directly from the CRB without the need to go through an employer or volunteering organisation. The Basic Disclosure will show all convictions held at national level which are not "spent" as defined under the terms of the *Rehabilitation of Offenders Act 1974* (ROA).

b. Standard Disclosure

The CRB website provides a brief summary of the information disclosed in the two types of certificate currently available:

> These are primarily for posts that involve working with children or vulnerable adults. Standard checks may also be issued for people entering certain professions, such as members of the legal and accountancy professions. The Standard check contains details of all convictions held on the PNC including current and 'spent' convictions as well as details of any cautions, reprimands or final warnings. If a position involves working with children, the CRB check will indicate whether information is held on three government lists of those who are banned from working with children or the vulnerable.[89]

c. Enhanced Disclosure

The CRB website provides the following information about this type of disclosure:

> These are for posts that involve a far greater degree of contact with children or vulnerable adults. In general the type of work will involve regularly caring for, supervising, training or being in sole charge of such people. Examples include a Teacher, Scout or Guide leader. Enhanced checks are also issued for certain statutory purposes such as gaming and lottery licences.
>
> This level of check involves an additional level of check to those carried out for the Standard CRB check - a check on local police records. Where local police

[89] CRB: http://www.crb.gov.uk/Default.aspx?page=400#standard

> records contain additional information that may be relevant to the post the applicant is being considered for, the Chief Officer of police may release information for inclusion in an Enhanced check. Exceptionally, and in a very small number of circumstances (typically to protect the integrity of current police investigations), additional information may be sent under separate cover to the Countersignatory and should not be revealed to the applicant.[90]

As stated above, section 112 of the Act (which relates to "criminal conviction certificates" or "basic disclosure") has not yet come into force in England and Wales. It was brought into force in Scotland on 31 July 2002[91]and was to have been introduced in England and Wales in the second half of 2002 but its introduction was delayed following the teething problems suffered by the Criminal Records Bureau after it began operations in March 2002.

Sections 113-116 ("criminal record" and "enhanced criminal record" certificates or "standard" and "enhanced" disclosures) were brought into force on 1 March 2002 in England and Wales,[92] and on 25 April 2002 in Scotland.[93]

Standard and enhanced disclosures are issued to the individual concerned and the "registered body" which has countersigned the application. "Registered bodies" are organisations such as local authorities, health authorities, social service organisations, and voluntary organisations who act as or for employers in areas involving contact with children or vulnerable adults etc.

When they are introduced, basic disclosures will only be issued, on request, to the individual they concern. They will not be issued to organisations directly. However, a prospective employer could make a job offer conditional upon sight of such a disclosure record. In most cases, there will be a charge for the disclosure, although standard and enhanced disclosures are issued free of charge to volunteers.

5. Disclosure Fees

The current fees are set out on the CRB website:[94]

> **Fees**
>
> The following fees apply from 6 April 2006:
>
> Standard Disclosure- £**31.00**
> Enhanced Disclosure - £**36.00**
>
> Standard and Enhanced Disclosures are free of charge to volunteers

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90 CRB: http://web.archive.org/web/20060210111605/http://www.crb.gov.uk/Default.aspx?page=400

91 Scottish SI 2002/124, *Police Act 1997 (Commencement No 10) (Scotland) Order 2002.* See "frequently asked questions" on the Disclosure Scotland website: http://www.disclosurescotland.co.uk/

92 SI 2002/413

93 Scottish SI 2002/124

94 CRB: http://collections.europarchive.org/tna/20081105160500/http://www.crb.gov.uk/Default.aspx?page=387

POVAFirst - £**6-00**
Registration - £**300.00** (this includes the cost of the Lead Countersignatory)
Additional Countersignatories - £**5.00** (this fee also applies for a change of name or signature of a signatory)

A fee of £13.60 (applicable to all levels of disclosure) applied in Scotland until April 2006. The Scottish fees are as follows:

Registration Fees
£150 for an organisation to become a Registered Body (includes one Countersignatory). Each organisation should determine how many Registered Bodies it has – for example, a Local Authority can be a Registered Body in its own right or it can register each of its Departments (always having consideration to its business needs in respect of carrying out Disclosure checks). However, in this example, each Department would be charged the Registration Fee.

£10 for each additional Countersignatory. Each Registered Body can determine the number of additional Countersignatories to suit their business needs - Disclosure Scotland does not impose any limit.

Disclosure Fee
The fee for Disclosures is **£20**. This applies to all levels of Disclosure.

Application forms which have Barcodes commencing 00201, 00202, 00203 or 00301 which state **£13.60** and are received on or after 1 April 2006 will be charged the new fee of **£20.**

There is no additional charge if payment is made via a debit or credit card.

Free Disclosures are available for those voluntary (unpaid) posts within the voluntary sector in Scotland.[95]

Part V of the Act contains some information about what exactly can be disclosed in the different types of certificate, but most of the detail is "prescribed" in regulations made under the Act. The main regulations made so far are the *Police Act 1997 (Criminal Records) Regulations 2002*, SI No.233 and the *Police Act 1997 (Criminal Records) (Scotland) Regulations 2002,* Scottish SI No.143.

6. Occupations for which standard and enhanced disclosures can be issued: *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1974*

Recent legislation has made it compulsory for employers to carry out checks on employees in certain posts, notably those involving work with children or other vulnerable people. Accordingly, standard or enhanced disclosures are required.

Sections 113 (2) and 115 (2) of the Police Act 1997 provide that standard and enhanced disclosures can only be issued for positions which are exempted from the *Rehabilitation of Offenders Act 1974.* These are posts (mainly involving working with children, regular

[95] Disclosure Scotland: http://web.archive.org/web/20050206024706/http:/www.disclosurescotland.co.uk/

contact with vulnerable adults, the administration of the law and certain other professions) for which previous criminal convictions, however long ago, must be revealed – i.e. they cannot become "spent". The positions are listed in the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1974* SI No.1023 as amended. Schedule 1, Part 1 gives excepted professions as follows (square brackets indicate subsequent amendments):

> 1 Medical practitioner.
> 2 Barrister (in England and Wales), advocate (in Scotland), solicitor.
> 3 Chartered accountant, certified accountant.
> 4 Dentist, dental hygienist, dental auxiliary [dental therapist].
> 5 Veterinary surgeon.
> 6 Nurse, midwife.
> 7 [Optometrist], dispensing optician.
> 8 Pharmaceutical chemist.
> 9 Registered teacher (in Scotland).
> 10 Any profession to which the [Health Professions Order 2001] applies and which is undertaken following registration under that Act.
> [11 Registered osteopath.]
> [12 Registered chiropractor.]
> [13 Chartered psychologist.
> 14 Actuary.
> 15 Registered foreign lawyer.
> 16 Legal executive.
> 17 Receiver appointed by the Court of Protection.]

Schedule 1, Part 2 covers offices, work and employments:

> 1 Judicial appointments.
> [2 The Director of Public Prosecutions and any office or employment in the Crown Prosecution Service.]
> 3 Procurators Fiscal and District Court Prosecutors, and any employment in the office of a Procurator Fiscal or District Court Prosecutor or in the Crown Office.
> [4 [Designated officers for magistrates' courts, for justices of the peace or for local justice areas], justices' clerks and their assistants.]
> 5 Clerks (including depute and assistant clerks) and officers of the High Court of Justiciary, the Court of Session and the district court, sheriff clerks (including sheriff clerks depute) and their clerks and assistants.
> 6 Constables, persons appointed as police cadets to undergo training with a view to becoming constables and persons employed for the purposes of, or to assist the constables of, a police force established under any enactment; naval, military and air force police.
> 7 Any employment which is concerned with the administration of, or is otherwise normally carried out wholly or partly within the precincts of, a prison, remand centre, [young offender institution] or young offenders institution, and members of boards of visitors appointed under section 6 of the Prison Act 1952 or of visiting committees appointed under section 7 of the Prisons (Scotland) Act 1952.
> 8 Traffic wardens appointed under section 81 of the Road Traffic Regulation Act 1967 or section 9 of the Police (Scotland) Act 1967.
> 9 Probation officers appointed under Schedule 3 to the Powers of Criminal Courts Act 1973.
> 10 . . .
> 11 . . .

[12 Any employment or other work which is concerned with the provision of care services to vulnerable adults and which is of such a kind as to enable the holder of that employment or the person engaged in that work to have access to vulnerable adults in receipt of such services in the course of his normal duties.]
[13 Any employment or other work which is concerned with the provision of health services and which is of such a kind as to enable the holder of that employment or the person engaged in that work to have access to persons in receipt of such services in the course of his normal duties.]
[14 Any work which is—
(a) work in a regulated position; or
(b) work in a further education institution where the normal duties of that work involve regular contact with persons aged under 18.]
[15 Any employment in the Royal Society for the Prevention of Cruelty to Animals where the person employed or working, as part of his duties, may carry out the killing of animals.
16 Any office or employment in the Serious Fraud Office.
17 Any office or employment in the [Serious Organised Crime Agency].
18 Any office or employment in Her Majesty's Customs and Excise.
19 Any employment which is concerned with the monitoring, for the purposes of child protection, of communications by means of the internet.]
[20 Any employment or other work which is normally carried out in premises approved under section 9 of the Criminal Justice and Court Services Act 2000.
21 Any employment or other work which is normally carried out in a hospital used only for the provision of high security psychiatric services.]

Schedule 1, Part 3 covers regulated occupations:

1 Firearms dealer.
2 Any occupation in respect of which an application to the Gaming Board for Great Britain for a licence, certificate or registration is required by or under any enactment.
[3 Director, controller or manager of an insurer.]
4 Dealer in securities.
5 Manager or trustee under a unit trust scheme.
6 Any occupation which is concerned with—
(a) the management of a place in respect of which the approval of the Secretary of State is required by section 1 of the Abortion Act 1967; or
(b) in England and Wales, carrying on a nursing home in respect of which registration is required by section 187 of the Public Health Act 1936 or section 14 of the Mental Health Act 1959; or
(c) in Scotland, carrying on a nursing home in respect of which registration is required under section 1 of the Nursing Homes Registration (Scotland) Act 1938 or a private hospital in respect of which registration is required under section 15 of the Mental Health (Scotland) Act 1960.
7 Any occupation which is concerned with carrying on an establishment in respect of which registration is required by section 37 of the National Assistance Act 1948 or section 61 of the Social Work (Scotland) Act 1968.
8 Any occupation in respect of which the holder, as occupier of premises on which explosives are kept, is required [pursuant to regulations 4 and 7 of the Control of Explosives Regulations 1991 to obtain from the chief officer of police a valid explosives certificate certifying him to be a fit person to acquire or acquire and keep explosives].
[9 . . .]

C. Checks on people working in schools and the NHS

1. Current arrangements for checks on staff in education establishments

DfES guidance, *Safeguarding Children in Education*, issued in September 2004, explained the duties of LEAs and education establishments in making arrangements to safeguard children from abuse.[96] The guidance was sent to the governing bodies of all schools, FE colleges in England, and proprietors of independent schools. It emphasised the need for safe recruitment procedures and for all appropriate checks to be carried out, including CRB and List 99 checks. Annex A to the guidance noted:

> Appointment of Staff
>
> 2. Safe recruitment practice means scrutinising applicants, verifying identity and any academic or vocational qualifications, obtaining professional and character references, checking previous employment history and that a candidate has the health and physical capacity for the job, and a face to face interview as well as the mandatory check of List 99 and, where appropriate, a Criminal Records Check.
>
> 3. Further advice can be found in the Department's guidance DfES 2002/0278 Child Protection: Preventing Unsuitable People from Working with Children and Young Persons in the Education Service and DfES 0780/2000, Criminal Records Bureau, Managing the Demand for Disclosures, which can be found at: https://web.archive.org/web/20030328093608/http://www.teachernet.gov.uk/

For information about List 99 checks, see above, footnote 72, of this research paper.

Additional DfES guidance was issued in June 2005, *Safeguarding Children: Safer Recruitment and Selection in Education Settings*.[97] It was sent to LEAs, school governing bodies, FE institutions, head teachers and principals of FE institutions, proprietors of independent schools and employment agencies and businesses that provide staff in schools. The guidance set out the elements of safer recruitment practices as follows:

> Elements of Safer Practice
>
> 11. Safer practice in recruitment means thinking about and including issues to do with child protection and safeguarding and promoting the welfare of children at every stage of the process. It starts with the process of planning the recruitment exercise, and, where the post is advertised, ensuring that the advertisement makes clear the organisation's commitment to safeguarding and promoting the welfare of children. It also requires a consistent and thorough process of obtaining, collating, analysing, and evaluating information from and about applicants. Main elements of the process include:

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96 http://web.archive.org/web/20050301201802/http://www.teachernet.gov.uk/wholeschool/familyandcommunity/childprotection/?section=2752&CFID=25409927&CFTOKEN=5719c7d-c441ef28-f6c2-47e7-ad9e-c9ee9a3357f3

97 DfES Ref: DfES/1568/2005, June 2005: http://www.teachernet.gov.uk/_doc/8592/Recruit.pdf

● ensuring the job description makes reference to the responsibility for safeguarding and promoting the welfare of children;
● that the person specification includes specific reference to suitability to work with children;
● obtaining and scrutinising comprehensive information from applicants, and taking up and satisfactorily resolving any discrepancies or anomalies;
● obtaining independent professional and character references that answer specific questions to help assess an applicant's suitability to work with children and following up any concerns;
● a face to face interview that explores the candidate's suitability to work with children as well as his/her suitability for the post;
● verifying the successful applicant's identity;
● verifying that the successful applicant has any academic or vocational qualifications claimed;
● checking his/her previous employment history and experience;
● verifying that s/he has the health and physical capacity for the job;
● the mandatory check of List 99 and/or the Protection of Children Act (PoCA) List, and, where appropriate, a criminal record check via the CRB. (N.B. It is important not to rely solely on criminal record and List 99 or PoCA List checks to screen out unsuitable applicants. Those checks are an essential safeguard, but they will only pick up the small percentage of abusers who have been convicted, or have come to the attention of the police, or who have been listed. The majority of individuals who are unsuited to working with children will not have any previous convictions, and will not appear on List 99 or the PoCA List.)

There is now an online safer recruitment training programme for school governors and head teachers.[98]

Following the then Education Secretary's statements on 19 January 2006 and 1 March 2006 on changes to the vetting and barring system, regulations have been introduced to require mandatory CRB checks for all newly appointed teachers and support staff in maintained schools, including supply teachers. The regulations came into force on 12 May 2006.[99]

New DfES guidance on dealing with allegations of abuse against teachers and other education staff was issued on 21 November 2005.[100] This guidance introduced new arrangements for dealing with allegations of abuse made against a teacher or other member of staff or volunteers in an education setting. It aims to ensure that any allegation is dealt with fairly, quickly, and consistently, in a way that provides effective protection for the child and at the same time supports the person who is the subject of the allegation. It supplements the DfES guidance referred to above.

2. NHS

Apart from specific provisions for GPs, Criminal Records Bureau (CRB) checks for people working in the NHS are not generally a legal requirement.[101] However, guidance

98 HL Deb, 28 March 2006 c722
99 SI 2006 No. 1067, SI 2006 No. 1068
100 Dealing With Allegations of Abuse Against Teachers And Other Education Staff
101 NHS Employers, Standards for Better Health (page 16)

to NHS employers in all NHS settings says that employers must obtain CRB checks on new recruits who have direct access to patients as part of their normal duties.[102] (There are special provisions in some cases, for example, for students, trainees and junior doctors.)

Where posts involve children, checks against the lists held under the *Protection of Children Act 1999* are a legal requirement if the criteria of the Act are satisfied[103] as that Act does apply within the NHS. Of wider potential relevance to the NHS is the scheme for protecting vulnerable adults (PoVA), including its list of people banned from working with vulnerable adults,[104] which does not yet apply within the NHS. The current Bill, which in effect brings the two lists under one umbrella, would thus extend the checks required in the NHS.[105] It would also make certain other changes such as placing extra requirements on professional and supervisory bodies and giving them extra powers.[106]

Although there is not a direct legal requirement for them to make CRB checks, NHS bodies have a legal duty to monitor and improve health and in doing so have to take account of standards set by the Secretary of State.[107] The fulfilment of these standards is monitored by the Healthcare Commission, which makes reports on the performance of NHS bodies.[108] The standards include a requirement to undertake appropriate employment checks.[109] The Department of Health has not issued detailed guidance about the way that the standard is to be carried out but its website refers to guidance issued by NHS Employers (the employers' organisation for the NHS in England) issued in May 2005.[110] This is called Safer Recruitment - a guide for NHS employers.[111] It replaces earlier directions of the Secretary of State and Departmental guidance on the issue[112] and is available on the NHS Employers website.

The legislation and guidance relating to G.Ps is separate. In summary, Primary Care Trusts (PCTs) are required by law to keep lists of "primary medical performers" and Regulations require that from 1 April 2004 all G.P.s applying to be on their Performers' List must supply an enhanced CRB certificate.[113] PCTs also held a special exercise

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http://web.archive.org/web/20070205151216/http://www.dh.gov.uk/assetRoot/04/13/29/91/04132991.pdf

102 As above

103 See earlier sections of this Paper.

104 See earlier sections of this Paper.

105 See, for example, clause 44 which includes someone receiving any form of health care within the definition of a vulnerable adult.

106 See, for example, clauses 32-38, which require them to refer and report and schedule 5 which enables them to take into account the fact that a person has been included on a barred list.

107 Section 45 and 46 of the *Health and Social Care (Community Health and Standards) Act 2003*.

108 Healthcare Commission
http://web.archive.org/web/20060602000310/http://www.healthcarecommission.org.uk/Homepage.cfm

109 Department of Health, *Standards for Better Health* (updated April 2006):
http://web.archive.org/web/20070205151216/http://www.dh.gov.uk/assetRoot/04/13/29/91/04132991.pdf

110 The Department of health's web references is
http://web.archive.org/web/20060213204608/http://www.dh.gov.uk/PolicyAndGuidance/HumanResourcesAndTraining/ModernisingProfessionalRegulation/PrePostEmploymentChecks/fs/en

111 Department of Health, *Standards for Better Health* :
http://web.archive.org/web/20070205151216/http://www.dh.gov.uk/assetRoot/04/13/29/91/04132991.pdf

112 For example, it replaces HSC 2002/008.

The NHS (Performers Lists) Regulations 2004 (SI 2004/585). Information about operation of medical performers lists is available on the Department's website at:
http://web.archive.org/web/20070205121141/http://www.dh.gov.uk/PolicyAndGuidance/OrganisationPolicy/PrimaryCare/ManagementPrimaryCarePractitioners/fs/en

during the second half of 2004 and early 2005 in which all G.Ps who had not already provided a certificate had to do so. Guidance to PCTs on this and other matters relating to the management of their Primary Medical Performers Lists is available on the Department of Health website.[114]

D. Employment Agencies

Employment agencies and employment businesses in the UK are regulated by the *Employment Agencies Act 1973*, as amended ("the 1973 Act") and regulations made under this Act. The *Conduct of Employment Agencies and Employment Business Regulations 2003 SI No.3319* came into force in April 2004 and replaced the previous regulations which were made in 1976.[115] The Employment Agency Standards Inspectorate carries out routine inspections of agencies and investigates complaints about agency conduct.[116] Under the *Employment Agencies Act 1973 (Exemption) Regulations 1976 SI No.710* various jobs are excluded from the scope of the Act. These include certain educational institutions and services for qualified nurses and certified midwives.[117]

Under the regulations employment agencies must obtain adequate information from employer and worker clients for the purpose of selecting a suitable worker for a vacancy and vice versa. They must ensure that worker and employer are aware of any conditions imposed by law which must be satisfied (eg the need for a work permit in the case of an overseas worker) and that the employment will be legal. The new regulations introduced additional requirements. These are explained in the DTI guidance:

> **Additional requirements where professional qualifications are required or where work-seekers are to work with vulnerable persons – regulation 22**
>
> Regulations 18-21 (see pages 12 & 13) set out the requirements that an agency or employment business must follow when introducing a work-seeker to a hirer. Regulation 22 places further obligations where the work-seeker is required to possess qualifications or authorisation by law or a professional body to work in a particular job; if the position involves working with young people, or caring for the elderly, infirm, or any other circumstances needing care or attention.
>
> The additional obligations require the agency/employment business to obtain, and to offer to the hirer: copies of the work-seeker's relevant qualifications or authorisations; two references from persons, not related to the work-seeker, who have agreed that they can be disclosed to the hirer; and, where the work-seeker is to work with vulnerable persons, the agency/employment business has taken all reasonable steps to confirm that the work-seeker is not unsuitable for the work. We would expect that, when complying with this regulation, employment agencies or employment businesses introducing or supplying work-seekers to be

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[114] Department of Health, Primary Medical Performers Lists: Delivering Quality in Primary Care http://web.archive.org/web/20070205211711/http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4087622&chk=8/3C28

[115] *Conduct of Employment Agencies and Employment Business Regulations 1976 SI No 715*

[116] Employment Agency Standards Inspectorate http://web.archive.org/web/20050219001501/http://www.cst.gov.uk/er/agency.htm

[117] Full details of those excluded from the legislation are set out in section 13 (4) & (7) of the 1973 Act.

> employed as nannies, babysitters or other childcare workers, would normally have undertaken a Criminal Records Bureau check for those work-seekers.
>
> If an agency/employment business has taken all reasonable steps to obtain two references but been unable to do so, it can should comply with those requirements as far as it is able, inform the hirer that it is unable to comply fully and give details of the efforts taken to attempt to comply.[118]

If new, adverse information comes to light, they will have to withdraw the temporary worker or inform the employer if the worker has been supplied on a permanent basis.

Clause 28 of the Bill will introduce new requirements on "personnel suppliers" to provide certain information in relation to regulated or controlled activities.[119]

E. Enforced subject access: *Data Protection Act 1998*

Individuals have the right to access their own criminal records under the *Data Protection Act 1998*. Some employers ask job applicants to apply to the police for a copy of their own records using the subject access provisions of the data protection legislation. This is known as "enforced subject access". This will become illegal, under section 56 of the *Data Protection Act 1998*, once the CRB starts to issue basic disclosures. Section 75 (4) of the Act provides that section 56 cannot come into force

> earlier than the first day on which sections 112, 113 and 115 of the *Police Act 1997* (which provide for the issue by the Secretary of State of criminal conviction certificates, criminal record certificates and enhanced criminal record certificates) are all in force.

The Information Commissioner issued guidance on this in his *Employment Practices Data Protection Code. Part 1: Recruitment and Selection*, which was published on the Internet in March 2002, but has since been amended to reflect the fact that there is as yet no date for the introduction of basic disclosures. Under a list of "Benchmarks for the handling of information obtained through disclosure" the original guidance provided the following advice:

> Do not attempt to obtain information about criminal convictions by enforced subject access or from sources other than the CRB or the applicant. The carrying out of media checks to look for spent convictions for a post that is not eligible for standard or enhanced disclosure is likely to breach the Act. Media checks involve obtaining information from old newspaper articles or similar sources about an individual.[120]

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[118] Employment Agency Standards Inspectorate, *Summary Guidance on the Employment Agencies Legislation*: http://webarchive.nationalarchives.gov.uk/20070402090544/http://www.dti.gov.uk/files/file23765.pdf (retrieved 8 June 2006)

[119] HL Deb 3 May 2006 c268-9 GC

[120] Information Commissioner's Office https://web.archive.org/web/20030206212129/http://www.dataprotection.gov.uk/dpr/dpdoc.nsf

F. Checks on workers from overseas

1. CRB Overseas Information Service

At present the CRB cannot conduct overseas criminal record checks. The Police National Computer (PNC) may have some information, but this is not comprehensive. Accordingly, the value of a CRB check on someone who has spent a long time out of the UK is regarded as having limited value. The Bureau's Overseas Information Service provides advice to employers on the availability of criminal record information from overseas. The service currently covers 21 countries.[121] The CRB now provides this information online. The webpage explains this as follows:

> The CRB cannot currently access overseas criminal records or other relevant information as part of its Disclosure service. If you are to recruit people from overseas and wish to check their overseas criminal record, a CRB Check may not provide a complete picture of their criminal record that may or may not exist. To help you get a fuller picture of their background, the CRB provides guidance on how you can get further information from the countries listed below.
>
> If the country that you are looking for is not listed you may wish to contact the country's representative in the United Kingdom. Contact details for those countries that have a representative in the United Kingdom can be found on the Foreign and Commonwealth website www.fco.gov.uk or telephone 020 7008 1500.
>
> Please note:
> The CRB is not involved in the processing of applications made by individuals to overseas authorities and therefore will not be responsible for the contents or the length of time taken for information to be returned. The information provided by overseas authorities may be in the language of the country to which the application was made. It may therefore be necessary for customers to have this information translated. The CRB does not provide information about translation issues.
>
> - Australia
> - Canada
> - Czech Republic
> - Denmark
> - Finland
> - France
> - Germany
> - Hungary
> - Irish Republic
> - Italy (excluding Vatican City)
> - Jamaica
> - Latvia
> - Malaysia
> - Malta
> - Netherlands

[121] CRB Webpage: http://www.crb.gov.uk/Default.aspx?page=2243

- New Zealand
- Philippines
- Poland
- South Africa
- Spain
- Sweden

A written answer given in April 2004 explained the position:

Criminal Records Bureau

> **Charles Hendry**: To ask the Secretary of State for the Home Department what additional powers the Criminal Records Bureau would require to carry out checks on all people coming from abroad before they were able to take up positions working with children or vulnerable people. [165831]
>
> **Ms Blears** [holding answer 19 April 2004]: Part 5 of the Police Act 1997, under which the Criminal Records Bureau operates, does not empower the Bureau to search databases outside the United Kingdom for conviction and other information shown on its Disclosures. Inquiries made about arrangements in force in other countries have shown both how varied they are and how complex it would be to introduce widespread arrangements to link up with records in a range of other countries. The Bureau has taken the initiative by establishing its overseas information service for the benefit of employers who are considering recruiting staff from outside the UK. The service provides detailed information about the arrangements for checks in other countries, including where such information can be obtained, how to go about obtaining a check, the cost and the time taken.[122]

The information was previously given in the form of a fax-back service. The Overseas Information Service is a non statutory service. Details of its set-up and operation were given in a PQ in February 2003:

> **Mr. Burstow**: To ask the Secretary of State for the Home Department when the Criminal Record Bureau plans to launch an advisory service to employers about the availability of checks in a variety of countries; how much the contract is valued at; when the contract will expire; how many people are employed in the service; how much his Department is investing in the service; and if he will make a statement. [97141]
>
> **Hilary Benn**: The Criminal Records Bureau (CRB) launched an overseas information service on 4 December 2002. This provides information, via a fax-back service, on the criminal record checking regimes available in 15 countries. It is expected that the number of countries included in this service will rise during the course of 2003.
>
> The aim of the service is to provide employers with information that will lead them to sources of information overseas, beyond those capable of being offered by the CRB, to help them make safer recruitment decisions. The only contracted-out element is the fax-back service operated by iTouch (UK) Limited. The amount

[122] HC Deb 22 April 2004 c592W

> received by iTouch (UK) Limited over the period of the contract will depend upon the number of inquiries made to the faxback service. The contract is scheduled to run until December 2005, at which time it will be reviewed. All other aspects of the scheme are administered by civil servants employed by the CRB. Two members of staff undertake this work as part of their other duties. The total measurable cost of providing the service during the current financial year has so far been £3,650.00.
>
> The overseas information service is a non-statutory service provided by the CRB. Part V of the Police Act 1997 under which the CRB was created did not envisage the CRB obtaining overseas criminal records as part of the Disclosure service. Nevertheless, it was recognised that foreign nationals (and UK nationals returning from a period of residence overseas) make up a significant portion of the UK workforce. These individuals often occupy positions of trust, which would normally attract a CRB Standard or Enhanced Disclosure. However a Disclosure would be of limited use for employers seeking to recruit a foreign national, given that it is unlikely that these individuals would feature on the UK data sources accessed as part of the CRB Disclosure service.
>
> (…)
>
> The CRB is not involved in any application made to an overseas authority, nor is it responsible for the processes operated by or the nature of the information returned by that overseas authority. The costs incurred in the financial year 2001–02 amount to just over £25,000. The Overseas project was commissioned by the CRB Chief Executive in May 2001 and was concerned with establishing contact with, and benchmarking against, equivalent agencies overseas. This figure includes a number of fact-finding visits to many of the countries covered by the faxback service. The latest visit was undertaken in December 2001.[123]

2. United States

The current CRB service does not cover the USA. Maintaining accessible records on criminal convictions in the US is done by each respective State. This has resulted in a very wide variety of different regimes, agencies and access provisions. Arrangements have been developed for the sharing of information between States. A nationwide system of sex offender registration has been put in place in the US.[124] Information required for employment checks, as opposed to criminal justice or law enforcement is known as "noncriminal" access and normally requires that fingerprints be provided for identification. The website for the Bureau of Justice gives an outline of the arrangements currently in place.[125] A comprehensive overview on the US law in this area is provided by the *2002 Compendium of State Privacy and Security Legislation*.[126] This explains the federal law governing the provision of criminal records for criminal justice purposes and gives an account of the variety of different provisions existing in different States. In

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123 HC Deb 25 February 2003 cc395-6W

124 US Bureau of Justice Statistics
http://web.archive.org/web/20050211011704/http://www.ojp.usdoj.gov/bjs/crs.htm

125 US Bureau of Justice Statistics
http://web.archive.org/web/20050211011704/http://www.ojp.usdoj.gov/bjs/crs.htm

126 US Department of Justice, *2002 Compendium of State Privacy and Security Legislation*
http://web.archive.org/web/20050324105324/http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsl02.pdf

respect of "noncriminal" access (access other than for law enforcement or the criminal justice system) the document explains how complex and varied the position is in the different States. [127]

Another document published by the US Department of Justice entitled *Use and Management of Criminal History Record Information: A Comprehensive Report* sets out in detail the provisions for keeping and sharing criminal records. From this it is clear that each State has its own agency responsible for maintaining information and making it accessible.[128]

3. Europe

The Home Office have been holding discussions about a proposal to share information across Europe on child sex offenders:

Background Checks (EU)

> **Charles Hendry**: To ask the Secretary of State for the Home Department what discussions he has had with his EU counterparts regarding requirements for checks on people coming to the UK from other EU countries before they can take up positions working with children or vulnerable people. [165832]
>
> **Paul Goggins** [holding answer 19 April 2004]: On 18 March 2004 the Home Office held a seminar on collecting and sharing of information on child sex offenders across Europe. The seminar provided an opportunity for policy officials from across Europe to discuss how we can improve the collection and sharing of information on those who pose a risk of sexual harm. In particular the seminar examined how member states can ensure that people who pose a risk to children do not evade any requirements or disqualifications put on them in one country by moving to another.
>
> We are now considering the options that arose from discussions at the seminar on how we can take this area of child protection forward.[129]

In addition, a debate took place in the House of Lords in March 2004 which focussed on child protection.[130] Lord Harrison gave an outline of some relevant developments within Europe:

> If the mechanisms and practices of sharing information across the UK are problematic, in the EU they are parlous. The entry of 10 new countries in May should deepen our concerns. For instance, Portugal has no current provision for disqualifying unsuitable people from working with children. Even if a Portuguese employer does check an applicant's criminal record—something which is not obligatory— the authorities have no power to reveal details of convictions which

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[127] Ibid, page 10

[128] US Department of Justice, *Use and Management of Criminal History Record Information: A Comprehensive Report* http://web.archive.org/web/20050602131338/http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf

[129] HC Deb 22 April 2004 c590W

[130] HL Deb 2 March 2004 cc625-640

have attracted a sentence below six months. In Austria an employer who checks and discovers a potential employee's criminal conviction retains the discretion nevertheless to employ that individual. As regards new European Union states, most have legislation in this field which is slender at best and absent at worst. The Minister might consider commissioning the Institute of Advanced Studies at the University of London to expand its 2001 report to identify different disqualifications and vetting systems current across the new Europe of 25 to enable us better to respond to this open sore. Will the Minister do so?

The European Union is now beginning to bestir itself in the face of these threats. The recent Danish presidency introduced a proposal for a Council decision on increasing co-operation among EU states with regard to sharing employee disqualifications. At that time my noble friend Lord Filkin suggested on behalf of the Government that the proposals should include disqualification in the field of sex offenders. Will the Government revive those suggestions? The European Parliament recently held a conference on the issue, which was attended by Jonathan Faull, the director-general of JHA, betokening, I hope, the Commission's warming interest. Will the Minister consult Jonathan Faull and leaders in the European Parliament about undertaking fresh initiatives?

Former Irish PM John Bruton has led the working group within the convention whose recommendations appear in the text for a proposed constitution for the European Union. The text demands the mainstreaming of child protection in all EU policies and programmes. Will the Government ensure that, if the constitution is ratified under the Irish presidency, that text is retained and acted upon? Will the Government take inspiration from our Irish colleagues, who, under their current presidency, have already emphasised existing resources available to member states to help to identify unsuitable employees seeking cross-border jobs, including the use of Europol, Cepol (the European Police College) and the EU Police Chiefs' Task Force?

A powerful initiative in that field would be for the Government to commit to establishing common minimum standards, including the encouragement of all EU countries to establish lists of sex offenders and appropriate mechanisms to share those lists across borders. That initiative could be a central plank of our own presidency in late 2005. Now is the time to catch the tide. The Government join the Council troika in 10 months' time, and work can be done now to accomplish the goal of drawing up lists in all EU countries and creating mechanisms to share information that will unremittingly track down those who so heartlessly track down our children. Will the Government respond?

The Government can do much more at EU level to protect children from the menace of under-vetted paedophiles in Europe's increasingly mobile workforce. I refer the Government to the DAPHNE II programme, concerned with violence against women and children, which runs from 2003–08, and whose funding has been doubled to accommodate the extension of the CUPISCO project from 15 to 25 countries. The Chancellor, who has an excellent record in helping underprivileged children, will recognise that the EU budget requires judicious expansion from time to time to fund effective and targeted programmes such as DAPHNE II.

Action at Community level will be strengthened when the new constitution is signed, especially as the draft proposals make direct reference to anticipating children's concerns in all EU policies. Will the Government confirm their wholehearted support of the proposed constitution, particularly the reference to

children? With the constitution in place, will the Government work to realise in full the 1991 Maastricht Treaty's creation of the JHA third pillar; the areas of freedom, security and justice in its derivative, the 1997 Amsterdam Treaty; and their own ultimate expression; that is, the vigorous implementation of the Eurojust proposals, an embodiment of the free movement of prosecution, which is so essential in this area? Will they co-operate with other EU states to explore the possibility of an EU-wide power to restrict the free movement of known paedophiles to their home countries? Similar measures have been enforced against football hooligans; children are clearly much more important. Furthermore, will the Government explain the implications of our absenting ourselves from the Schengen agreement? To what extent does our participation in the Schengen information system compensate? That, too, impacts on children.

I also invite the Minister to discuss the difficult question of establishing a proper balance between the human and civil rights of all European citizens, including sex offenders, with the rights of children to remain unmolested. If those competing rights clash from time to time, how are we to ensure that matters are resolved? I renew my plea to the Government to make action in this field an action point in the 2005 British presidency. Europe's children would expect nothing less.[131]

4. Teachers from overseas

Vetting of teachers and other staff, including those from overseas, is the responsibility of employers and employment agencies. Where information about possible convictions overseas is not available, the DfES advises employers to take special care in other checks on overseas candidates:

School Staff (Checks)

David T.C. Davies: To ask the Secretary of State for Education and Skills what measures are in place to ensure that foreign nationals working as teachers do not have criminal convictions in their countries of origin which would make them unsuitable for working with children. [44767]

Ruth Kelly: We advise schools to obtain a Criminal Records Bureau (CRB) Disclosure as part of their pre-appointment checks on anyone selected for appointment who is or has been resident in the UK. However, someone who has never lived in this country is unlikely to have a criminal record here and is unlikely to be included in List 99. We therefore advise employers to take extra care in other checks on overseas candidates and to seek information about the person's criminal history from their country of origin wherever possible. The CRB provides advice to employers about countries from which it is possible to obtain such information and how to obtain it.[132]

The Government is currently reviewing the current process for vetting overseas teachers.[133]

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131 Ibid, cc628-630
132 HC Deb 27 February 2006 c 581W
133 HC Deb 1 March 2006 c24WS

5. NHS

Safer Recruitment, the guidance issued by NHS Employers[134] in relation to CRB checks on overseas staff says:

> Employers who recruit staff from abroad should carry out the necessary police checks in line with that country's justice system and UK requirements.
>
> - Staff from outside of the UK will also require a PoCA check before being appointed to a regulated childcare position.
> - It is good practice to carry out a CRB check even if an applicant claims never to have lived in the UK, and a police check in the country of origin.
>
> The CRB www.crb.gov.uk offers advice about:
>
> - obtaining criminal record information in 17 countries and operates a fax-back facility.
> - how an individual can obtain his/her criminal record or certificate of good conduct from overseas.
>
> Where it is not possible to carry out any criminal record checks, e.g. asylum seekers or refugees, employers should make their recruitment decisions on the basis of all the other information available to them.

Guidance to G.P.s says that the CRB should process applications from people with a current or recent address outside the UK in the normal way.

G. The retention, management and use of police information and CRB disclosures

1. Review, retention and disposal of police information and records.

The rules governing the review, retention and disposal of police records of criminal convictions, cautions and other information have recently been replaced. The previous rules, the *ACPO General Rules for Criminal Record Weeding on Police Systems*, provided that where a subject had not been convicted for a recordable offence for a period of ten years from the date of their last conviction the record should be deleted unless any one of the following conditions applied:

> 5.1 The record contains a total of six months or more imprisonment, including suspended sentences. The total will be an aggregate of all sentences, irrespective of whether they are consecutive or concurrent.
>
> 5.2 The record contains three or more convictions for recordable offences.
>
> 5.3 The subject has on any occasion been found unfit to plead by reason of insanity, or has been sentenced under the Mental Health Acts.

[134] See the earlier section of this Paper on people working in the NHS.

5.4 The record contains a conviction for offences involving indecency, sexual offences or violence (as defined in the attached schedules), or trafficking in, importation of, or supply of all classes of drugs or possession of class 'A' drugs.

5.5 The record contains a conviction for an offence involving, as a victim , a child or young person, or one who is elderly, or who is mentally or physically disabled, where the MO indicates that the offender deliberating targets this class of victim.

5.6 The record contains a conviction for an offence involving terrorism under any provisions of anti-terrorism legislation.[135]

Where the condition set out in paragraph 5.2 applied the record was to be retained for twenty years from the date of the last conviction. Where the other conditions set out above applied the record would be retained until the death of the subject or until the subject reached one hundred years of age.[136]

The superseded guidelines made the following comments about the retention periods for other types of records;

Non-recordable convictions

Only recordable offences are entered onto the PNC on a stand-alone basis. The recording of non-recordable convictions on local systems is at the discretion of forces and their Chief constables, subject to the requirements of any applicable legislation.

Records containing cautions

If there are cautions but no convictions on the record and no further cautions have been recorded for a period of five years, the record will be deleted, except where the caution is accompanied by an 'offends against vulnerable person' information marker.

Records containing police reprimands and final warnings

If there are police reprimands or final warnings but no convictions on the record, the reprimands and warnings will be retained until the offender has attained the age of eighteen years and for a minimum period of five years. After attaining the age of eighteen years and if no police reprimands or final warnings have been recorded for a period of five years, the record will be deleted.

Records containing other disposals

Disposals other than conviction, caution, police reprimand, final warning, acquittal, discontinuance and non-guilty bind-over, will also be recorded, i.e., adjourned sine die and lie on file. The offences contained within such disposals

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[135] Association of Chief Police Officers of England, Wales and Northern Ireland, *General rules for criminal record weeding on police systems* November 2000 paragraph 5 at http://web.archive.org/web/20070320212416/http://www.acpo.police.uk/asp/policies/Data/weeding_rules_version5_nov_2000.doc

[136] *ibid*. para.6

> will determine the period of retention in accordance with the provisions of paragraphs 5, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6 and 6.
>
> A prosecution for recordable offence that is prosecuted to conviction and results in a bind-over, is a recordable conviction. The period of retention will be determined in accordance with the provisions of paragraphs 5, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6 and 6.
>
> Any other recordable offence not prosecuted to conviction but whereby the defendant accepts a bind-over, will be retained for the period of the bind-over.[137]

In some circumstances details of acquittals and discontinued cases were also retained. The weeding guidelines made the following comments about this:

> **Retention of acquittals or discontinued cases without caution**
>
> 12. Except in the circumstances mentioned in paragraph 13 below, details of acquittals, or of cases discontinued without caution, may not be retained beyond forty two days after the date of notification (this period is allowed to allow for appeals process and for the destruction of fingerprints to be synchronised with deletion of data on the computer record). When details of an acquittal or discontinued case are removed from a record, this will not affect the retention on the record, of any details of convictions, cautions, or other disposals.
>
> 13. In cases detailed at 13.1 and 13.2, acquittals and discontinued cases must be retained.
>
> 13.1 Acquittal for an offence of unlawful sexual intercourse by a male under the age of twenty four years with a female under the age of sixteen years, must be retained. The offence will be deleted when the male's age is twenty four years, in accordance with Section 6 (3) Sexual Offences Act 1956.
> 13.2 Acquittal in cases where possession of stolen goods can be approved, but insufficient "mens rea" on that occasion to convict, details will be retained for a period of one year from the date of charging for use as special evidence in accordance with Section 27 (3) Theft Act 1968, for use in any subsequent hearing for an offence of handling stolen goods.
>
> 14. Details may be retained for a period of five years of cases where a sexual offence is alleged, but the subject is acquitted, or the case is discontinued because of lack of corroboration or allegation of consent by the victim, providing identity is not an issue. An officer not below the rank of superintendent must give the authorisation which must be reviewed again at the end of the retention period. Cautions for sexual offences, ordinarily weeded after five years may also be reviewed, extended and retained where appropriate.
>
> 14.1 When considering cases for retention as at paragraph 14 above, the authorising officer must personally consider the full circumstances and only if the following criteria have been satisfied will authorisation for retention of the details be given.

[137] *ibid*. paragraphs 7-11.1

- The circumstances of the case would give cause for concern if the subject were to apply for employment for a post involving substantial access to vulnerable persons, and

- The decision to retain the information can be defended on the grounds of the prevention and detection of crime.[138]

A new *Code of Practice on the Management of Police Information* was laid before Parliament on 19 July 2005. The new Code came into force on 14 November 2005. The *Code* makes the following comments about the retention and deletion of police information:

> On each occasion when it is reviewed, information originally recorded for police purposes should be considered for retention or deletion in accordance with criteria set out in guidance under this code
>
> Guidance will acknowledge that there are certain public protection matters which are of such importance that information should only be deleted if:
>
> a) The information has been shown to be inaccurate, in ways which cannot be dealt with by amending the record; or
> b) It is no longer considered that the information is necessary for police purposes.[139]

In a lengthy judgment issued in October 2005 on an appeal brought by the chief constables of West Yorkshire, South Yorkshire and North Wales Police against enforcement notices issued by the Information Commissioner under data protection legislation, the Information Tribunal ruled that chief constables could retain data on criminal records for the purposes of making it available to police users alone, subject to the rules in the ACPO Code of Practice.[140] This decision was reported in an article in *Police Review* on 6 January 2006 which noted that a new set of retention guidelines, governing how police store and share sensitive data, would be published once the requirements set down by the Tribunal and changes to relevant legislation had been addressed.[141] The Times reported this decision on 21 January 2006 in an article entitled "Police to file all offences for life".[142]

Additional *Guidance on the Management of Police Information*, including guidelines on the collection, recording, evaluation, sharing, review, retention and disposal of police records, intelligence and other information held on all police systems other than the Police National Computer (PNC) was published in April 2006.[143] *Retention Guidelines* to replace the *ACPO General Rules for Criminal Record Weeding on Police Systems*, which will govern the review, retention and disposal of information on the Police National

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[138] *ibid*. paragraph 12-14

[139] *Code of Practice on the Management of Police Information* DEP 05/1136 July 2005 para.4.6

[140] T*he Chief Constables of South Yorkshire, West Yorkshire and North Wales Police v. the Information Commissioner* http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i204/north_wales_police.pdf

[141] "Data control" – *Police Review* 6 January 2006

[142] "Police to file all offences for life", *The Times*, 21 January 2006: http://www.timesonline.co.uk/article/0,,2-2002685,00.html

[143] ACPO, *Guidance on Management of Police Information*, 2006 http://web.archive.org/web/20061001111716/http://www.acpo.police.uk/asp/policies/Data/MoPI%20Guidance_INTER_03.03.06.pdf

Computer, were published on 31 March 2006.[144] The page on the Home Office website providing links to the retention guidelines notes that:

> The Retention Guidelines are based on a format of restricting access to PNC data, rather than the deletion of that data. The restriction of access is achieved by setting strict time periods after which the relevant event histories will 'step down' and only be open to inspection by the police.
>
> Following the 'step down' other users of PNC will be unaware of the existence of such records, save for those occasions where the individual is the subject of an Enhanced check under the Criminal Records Bureau vetting process. In those cases the data should be dealt with as intelligence and only disclosed, where the relevance test has been applied, on the authority of the Chief Officer. (This arrangement will come fully into place providing that changes to Part V of the Police Act 1997, set out in the current Safeguarding Vulnerable Groups Bill, are approved). The 'step down' time periods are based on the following criteria:
>
> - The age of the subject
> - The final outcome
> - The sentence imposed
> - The offence category [145]

2. Criminal Records Bureau Code of Practice

Section 122 of the *Police Act* 1997 requires the Secretary of State (the Home Secretary) to publish a "code of practice in connection with the use of information provided to registered persons" under Part V. This Code and an Explanatory Guide are available on the CRB website.[146] The Code of Practice is "intended to ensure - and to provide assurance to those applying for Standard and Enhanced Disclosures - that the information released will be used fairly."

The "Obligations of the Code" are:

> **1 Fair use of Disclosure information**
>
> Recipients of Disclosure information shall:
>
> - observe guidance issued or supported by the Criminal Records Bureau ("the Bureau") on the use of Disclosure information - and, in particular, recipients of Disclosure information shall not unfairly discriminate against the subject of Disclosure information on the basis of conviction or other details revealed.
>
> In the interest of the proper use of Disclosure information and for the reassurance of persons who are the subject of Disclosure information, registered persons shall

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144 Home Office (Police), *Retention Guidelines* (retrieved 14 June 2006): http://web.archive.org/web/20070108131613/http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/Bichard_Step_Model_Retention.pdf

145 *ibid*.

146 CRB, *What is the Code of Practice?* http://web.archive.org/web/20060314230011/http://www.crb.gov.uk/Default.aspx?page=311

- have a written policy on the recruitment of ex-offenders, so that a copy can be given to all applicants for positions where a Disclosure will be requested.
- ensure that a body or individual at whose request applications for Disclosures are countersigned has such a written policy and, if necessary, provide a model for that body or individual to use.

In order that persons who are, or who may be, the subject of Disclosure information are made aware of the use of such information, and be reassured, Employers shall

- ensure that application forms for positions where Disclosures will be requested contain a statement that a Disclosure will be requested in the event of a successful application, so that applicants are aware of the situation;
- include in application forms or accompanying material a statement to the effect that a criminal record will not necessarily be a bar to obtaining a position, in order to reassure applicants that Disclosure information will not be used unfairly;
- discuss any matters revealed in Disclosure information with the person seeking the position before withdrawing an offer of employment.
- make every subject of a Disclosure aware of the existence of this Code of Practice, and make a copy available on request; and
- in order to assist staff to make appropriate use of Disclosure information in reaching decisions, make available guidance in relation to the employment and fair treatment of ex-offenders and to the Rehabilitation of Offenders Act 1974.

2 Handling of Disclosure information

Recipients of Disclosure information

- must ensure that Disclosure information is not passed to persons not authorised to receive it under section 124 of the Act. Under section 124, unauthorised Disclosure is an offence;
- must ensure that Disclosures and the information they contain are available only to those who need to have access in the course of their duties;
- must securely store Disclosures and the information that they contain;
- should retain neither Disclosures nor a record of Disclosure information contained within them for longer than is required for the particular purpose. In general, this should be no later than six months after the date on which recruitment or other relevant decisions have been taken, or after the date on which any dispute about the accuracy of the Disclosure information has been resolved. This period should be exceeded only in very exceptional circumstances which justify retention for a longer period.

Registered persons shall

- have a written security policy covering the correct handling and safe-keeping of Disclosure information; and
- ensure that a body or individual at whose request applications for Disclosures are countersigned has such a written policy, and, if necessary, provide a model for that body or individual to adopt.

3 Assurance

Registered persons shall:

- cooperate with requests from the Bureau to undertake assurance checks as to the proper use and safekeeping of Disclosure information.
- report to the Bureau any suspected malpractice in relation to this Code of Practice or any suspected offences in relation to the misuse of Disclosures.

4 Umbrella Bodies

(a) An Umbrella Body is one which has registered with the Bureau on the basis that it will countersign applications on behalf of others who are not registered.

(b) Umbrella Bodies must satisfy themselves that those on whose behalf they intend to countersign applications are likely to ask exempted questions under the Exceptions Order to the Rehabilitation of Offenders Act 1974.

(c) Umbrella Bodies must take reasonable steps to ensure that those to whom they pass Disclosure information observe the Code of Practice.

5 Failure to comply with the Code of Practice

The Bureau is empowered to refuse to issue a Disclosure if it believes that

- a registered person, or
- someone on whose behalf a registered person

has acted has failed to comply with the Code of Practice.[147]

[147] CRB, *Code of Practice and Explanatory Guide for Registered Persons and other recipients of Disclosure Information*: http://www.crb.gov.uk/PDF/code_of_practice.pdf

Appendix: Illustrative list of offences giving rise to automatic bars without and with representations

These lists are taken from a DfES note for Lords Committee Stage, *Information Note 1(i)*, April 2006, House of Commons Library Deposited Paper 06/860

AUTOMATIC BARRING WITH NO RIGHT TO MAKE REPRESENTATIONS: CHILDREN'S LIST

• An offence contrary to section 1(1) of the *Sexual Offences Act 1956* (rape).
• An offence contrary to section 5 of the *Sexual Offences Act 1956* (sexual intercourse with a girl under the age of thirteen).
• An offence contrary to section 1 of the *Sexual Offences Act 2003* (rape).
• An offence contrary to section 2 of the *Sexual Offences Act 2003* (assault by penetration).
• An offence contrary to section 5 of the *Sexual Offences Act 2003* (rape of a child under 13).
• An offence contrary to section 6 of the *Sexual Offences Act 2003* (assault of a child under 13 by penetration).
• An offence contrary to section 7 of the *Sexual Offences Act 2003* (sexual assault of a child under 13).
• An offence contrary to section 8 of the *Sexual Offences Act 2003* (causing or inciting a child under 13 to engage in sexual activity).

AUTOMATIC BARRING WITH NO RIGHT TO MAKE REPRESENTATIONS: VULNERABLE ADULTS' LIST

Sexual Offences Act 2003, Part I, sections 30-37, offences "against persons with a mental disorder impeding choice":

• s30, sexual activity with a person with a mental disorder impeding choice;
• s31, causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity;
• s32, engaging in sexual activity in the presence of a person with a mental disorder impeding choice;
• s33, causing a person, with a mental disorder impeding choice, to watch a sexual act;
• s34, inducement, threat or deception to procure sexual activity with a person with a mental disorder
• s35, causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception;
• s36, engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder;
• s37, causing a person with a mental disorder to watch a sexual act by inducement, threat or deception.

Sexual Offences Act 2003, sections 38-41, offences that specifically relate to care workers:

• s38, care workers: sexual activity with a person with a mental disorder;

• s39, care workers: causing or inciting sexual activity;
• s40, care workers: sexual activity in the presence of a person with a mental disorder;
• s41, care workers: causing a person with a mental disorder to watch a sexual act.

AUTOMATIC BARRING WITH IMMEDIATE RIGHT TO MAKE REPRESENTATIONS

• An offence of murder, contrary to the common law.
• An offence under section 1 of the Infanticide Act 1938 (infanticide).
• An offence under section 4 of the *Sexual Offences Act 1956* (administering drugs to obtain or facilitate intercourse).
• An offence contrary to section 6(1) of the *Sexual Offences Act 1956* (sexual intercourse with a girl under the age of sixteen).
• An offence under section 7 of the *Sexual Offences Act 1956* (intercourse with defective) by having sexual intercourse with a child.
• An offence under section 9 of the *Sexual Offences Act 1956* (procurement of defective) (procuring a child to have sexual intercourse).
• An offence contrary to section 10(1) of the *Sexual Offences Act 1956* (incest by a man).
• An offence contrary to section 11(1) of the *Sexual Offences Act 1956* (incest by a woman).
• An offence contrary to section 12(1) of the *Sexual Offences Act 1956* (buggery).
• An offence contrary to section 14(1) of the *Sexual Offences Act 1956* (indecent assault on a woman).
• An offence contrary to section 15(1) of the *Sexual Offences Act 1956* (indecent assault on a man).
• An offence contrary to section 16(1) of the *Sexual Offences Act 1956* (assault with intent to commit buggery).
• An offence contrary to section 13 of the *Sexual Offences Act 1956* (indecency between men).
• An offence under section 21 of the *Sexual Offences Act 1956* (abduction of defective from parent or guardian) by taking a child out of the possession of her parent or guardian.
• An offence under section 22 of the *Sexual Offences Act 1956* (causing prostitution of women) in relation to a child.
• An offence under section 23 of the *Sexual Offences Act 1956* (procuration of girl under 21) by procuring a child to have sexual intercourse with a third person.
• An offence under section 25 or 26 of the *Sexual Offences Act 1956* (permitting girl, under 13, or between 13 and 16, to use premises for intercourse).
• An offence under section 27 of that Act (permitting defective to use premises for intercourse) by inducing or suffering a child to resort to or be on premises for the purpose of having sexual intercourse.
• An offence under section 28 of the *Sexual Offences Act 1956* (causing or encouraging prostitution of, intercourse with or indecent assault on, girl under 16).
• An offence under section 29 of the *Sexual Offences Act 1956* (causing or encouraging prostitution of defective) by causing or encouraging the prostitution of a child.
• An offence under section 30 of the *Sexual Offences Act 1956* (man living on earnings of prostitution) in a case where the prostitute is a child.
• An offence under section 31 of the *Sexual Offences Act 1956* (woman exercising control over prostitute) in a case where the prostitute is a child.
• An offence under section 128 of the *Mental Health Act 1959* (sexual intercourse with patients) by having sexual intercourse with a child.

• An offence contrary to section 1(1) of the Indecency with *Children Act 1960* (indecency with children under the age of sixteen).
• An offence under section 4 of the *Sexual Offences Act 1967* (procuring others to commit homosexual acts) by-
(i) procuring a child to commit an act of buggery with any person, or
(ii) procuring any person to commit an act of buggery with a child.
• An offence under section 5 of the *Sexual Offences Act 1967* (living on earnings of male prostitution) by living wholly or in part on the earnings of prostitution of a child.
• An offence under section 9(1)(a) of the *Theft Act 1968* (burglary), by entering a building or part of a building with intent to rape a child.
• An offence under section 4(3) of the *Misuse of Drugs Act 1971* by-
(i) supplying or offering to supply a Class A drug to a child,
(ii) being concerned in the supplying of such a drug to a child, or
(iii) being concerned in the making to a child of an offer to supply such a drug.
• An offence contrary to section 54(1) of the *Criminal Law Act 1977* (inciting a girl under the age of sixteen to have incestuous sexual intercourse).
• An offence contrary to section 1(1) of the *Protection of Children Act 1978* (take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; distribution or possession of indecent photograph of a child).
• *Mental Health Act 1983*: s. 126 (forgery, false statements etc., in relation to documents, etc. under the Act; s.127 (ill-treatment of patients with a mental disorder); s.128 (helping or encouraging patients to escape from custody or from hospital without leave); s.129 (those who oppose inspection of premises, access to patients, for authorised investigations).
• An offence contrary to section 160 of the *Criminal Justice Act 1988* (possession of indecent photograph of a child).
• An offence under section 3 of the *Sexual Offences (Amendment) Act 2000* (abuse of trust).
• Schedule 4, *Criminal Justice and Courts Services Act 2000*, as amended: section 61 (administering a substance with intent), section 66 (exposure), section 67 (voyeurism).
• An offence under section 145 of the *Nationality, Immigration and Asylum Act 2002* (traffic in prostitution).
• An offence contrary to section 3 of the *Sexual Offences Act 2003* (sexual assault).
• An offence contrary to section 4 of the *Sexual Offences Act 2003* (causing a person to engage in sexual activity without consent).
• An offence contrary to section 9 of the *Sexual Offences Act 2003* (sexual activity with a child).
• An offence contrary to section 10 of the *Sexual Offences Act 2003* (causing or inciting a child to engage in sexual activity).
• An offence contrary to section 11 of the *Sexual Offences Act 2003* (engaging in sexual activity in the presence of a child).
• An offence contrary to section 12 of the *Sexual Offences Act 2003* (causing a child to watch a sexual act).
• An offence contrary to section 14 of the *Sexual Offences Act 2003* (arranging or facilitating commission of a child sex offence).
• An offence contrary to section 15 of the *Sexual Offences Act 2003* (meeting a child following sexual grooming etc).
• An offence contrary to section 16 of the *Sexual Offences Act 2003* (abuse of position of trust: sexual activity with a child).

• An offence contrary to section 17 of the *Sexual Offences Act 2003* (abuse of position of trust: causing or inciting a child to engage in sexual activity).
• An offence contrary to section 18 of the *Sexual Offences Act 2003* (abuse of position of trust: sexual activity in the presence of a child).
• An offence contrary to section 19 of the *Sexual Offences Act 2003* (abuse of position of trust: causing a child to watch a sexual act).
• An offence contrary to section 25 of the *Sexual Offences Act 2003* (sexual activity with a child family member).
• An offence contrary to section 26 of the *Sexual Offences Act 2003* (inciting a child family member to engage in sexual activity).
• *Sexual Offences Act 2003*, Part I: s.30-37 (offences against persons with a mental disorder impeding choice) and s.38-41 (offences that specifically relate to care workers).
• An offence contrary to section 47 of the *Sexual Offences Act 2003* (paying for sexual services of a child).
• An offence contrary to section 48 of the *Sexual Offences Act 2003* (causing or inciting child prostitution or pornography).
• An offence contrary to section 49 of the *Sexual Offences Act 2003* (controlling a child prostitute or a child involved in pornography).
• An offence contrary to section 50 of the *Sexual Offences Act 2003* (arranging or facilitating child prostitution or pornography).
• An offence contrary to section 57 of the *Sexual Offences Act 2003* (trafficking into the UK for sexual exploitation).
• An offence contrary to section 58 of the *Sexual Offences Act 2003* (trafficking within the UK for sexual exploitation).
• An offence contrary to section 59 of the *Sexual Offences Act 2003* (trafficking out of the UK for sexual exploitation).
• An offence under section 62 or 63 of the *Sexual Offences Act 2003* (committing an offence or trespassing with intent to commit a sexual offence) in a case where the intended offence was an offence against a child.
• An offence under section 4 of the *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* (trafficking people for exploitation).
• An offence under section 5 of the *Domestic Violence, Crime and Victims Act 2004* (causing or allowing the death of a child or vulnerable adult) in respect of a child.
• *Mental Capacity Act 2005* (not yet in force), s.44 (ill-treatment or neglect of a person who lacks capacity by a carer, done of lasting/enduring power of attorney or deputy).